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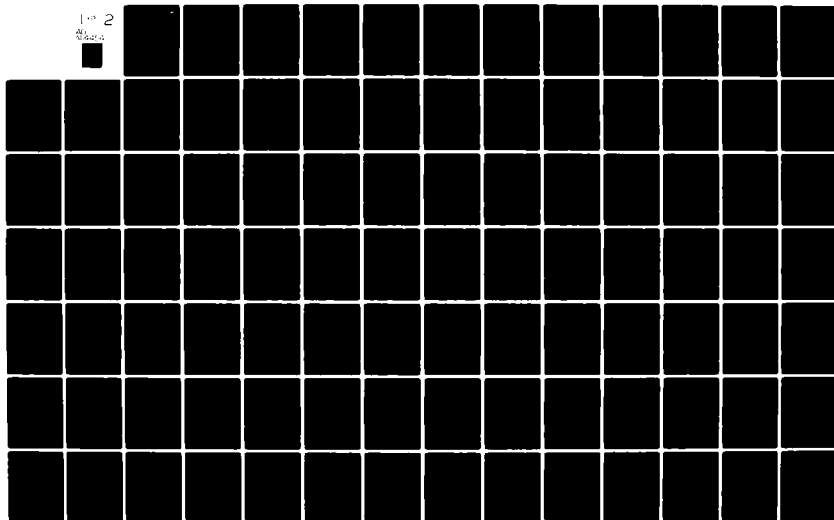
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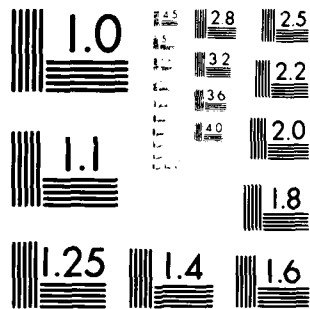
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INDIVIDUAL RESPONSIBILITY IN WAR

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Final Report - 28 April 1982

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A thesis submitted to the University of Virginia,  
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of the requirements for the degree of Master of Arts.

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when these conditions obtain are examined.

After this general treatment of responsibility, the scope is narrowed to the agent as combatant and combatant is defined. Also introduced are the rules of war (as they are often taken as the standard by which one's actions in war are judged). Further discussion focuses on how the previously discussed factors (coercion, insanity, etc.,) affect individual responsibility within the context of war. In addition, the pleas of "superior orders" and "military necessity" are also considered. The conclusion argued for is that, just as an individual may be fully responsible for his actions, so, too, may a soldier be fully responsible. However, just as the ordinary agent may be less than fully responsible (based on a variety of factors), the combatant's responsibility may also be affected.

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INDIVIDUAL RESPONSIBILITY IN WAR

Stephen Bellene  
Hopatcong, New Jersey

B.S., United States Military Academy, 1975

A Thesis Presented to the Graduate  
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Master of Arts

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## Introduction

It often seems that clearly defined moral rules have a way of dissolving in difficult situations. The state of war is one such difficult situation. In this state, moral problems seem to occur because this setting for moral decision-making is far removed from the normal frame of reference. Regardless of the difficulties, though, individuals still have to make decisions and carry them out. While the circumstances surrounding these agents are unique, there is a set of moral rules they, as combatants, are expected to follow in making these decisions; they are not unrestricted. How this unique situation, their status as combatants, and set of rules affect individual responsibility needs to be clarified.

This thesis will examine individual responsibility in war and the factors that affect such responsibility. The first issue to be considered (Chapter I) is the general notion of responsibility. By using H.L.A. Hart's analysis of the different senses of responsibility as a starting point, the somewhat unmanageable notion of "responsibility" can be refined. Having sharpened the broader notion to the particular senses of capacity responsibility, causal responsibility, role responsibility, and liability-responsibility, the latter will be further expanded to liability-responsibility of the moral and legal types. Having arrived at moral liability-responsibility,

it will be this that I will focus on. Put a bit differently, the issue that will be centered on is individual moral responsibility in war. While this general treatment will be brief, it must be present to provide a clearly defined notion that can be examined in the specific context of war.

This analysis of individual moral responsibility will be pursued from a specific viewpoint, too. The focus will be on the individual as a participant or combatant within war. This will serve to limit the examination by excluding questions of the responsibility of military and civilian leaders who are often far removed from the battlefield. While these areas are of interest also, not all aspects can be covered adequately. Also excluded from this chapter will be the issue of collective responsibility.

Having centered on agent moral responsibility, a general treatment of the factors taken to reduce this responsibility will be reviewed. Such issues as insanity, coercion, ignorance, mistake, accident, and negligence will be scrutinized in turn. Given that such conditions are taken to affect individual responsibility in that they can diminish it or excuse the agent from responsibility entirely, exactly when these conditions are taken to obtain will be examined. Having considered responsibility in general, centered on moral responsibility and what can affect it, and narrowed the scope to the agent as combatant, the groundwork will be laid for focusing on moral responsibility within the unique framework provided by war.

Before going further with individual moral responsibility, however, the rules of war will be introduced as the vehicle taken to be definitive in ascriptions of moral responsibility in war (Chapter II). What the rules of war are taken to be and what they attempt to accomplish will first be clarified. It will be argued that the laws of war do two things: they distinguish combatants from noncombatants and specify means of combat allowable between combatants. Having arrived at a rough conception of these war conventions, I will then separate the historic war convention from the war convention as it should be. The former is taken to be the body of the rules of war that have emerged through practice and formal agreement; the latter is the body of rules generated by following moral distinctions such rules ideally seek to maintain. This step of separating the two is necessary because the historic laws of war (it will be argued) are imperfect in construction.

Having made this connection between actual and ideal rules of war, the ideal rules will be generated by adhering to the moral distinction between combatant and noncombatant and considering how further rules seek to minimize the suffering of combatants. By focusing on the moral distinctions that these rules should turn on, the stage is set for examining what morally defensible rules soldiers are to be responsible for following.

Having argued that the ideal rules of war are those that either respect the moral distinction between combatants and

noncombatants or seek to minimize the suffering of combatants, what constitutes a moral violation in war will be elucidated. While it will be argued that the rules of war do these two things, the former function will be focused on. By doing so, one kind of moral violation in war can be neatly examined. Put a little differently, violations of the combatant-non-combatant distinction will be used to trace individual moral responsibility, although violations of the rules that seek to minimize combatant suffering will be briefly treated as moral violations, too. Again, this narrowing of scope is done to trim the thesis. Further, while the rules of war will have to be introduced and discussed because of their role in individual responsibility in war, treatment of such rules will be somewhat less than exhaustive.

Grasping the notion of a moral violation by an agent in war (through use of the rules of war as those which a soldier is morally required to follow), the factors considered under the general treatment of responsibility will be re-introduced. (Chapter III). Given that the previously discussed factors of coercion, ignorance, etc., were taken to reduce agent responsibility, possibly even to the point of absolving him completely, whether or not conditions for these factors obtain in the soldier's situation will be reviewed. Further, these conditions will be used to demonstrate that the particular pleas of "military necessity," "superior orders," and other war-specific excuses can be evaluated in terms of the factors

previously discussed, coupled with Hart's senses of responsibility.

Other factors taken to affect individual responsibility in war and not previously discussed will be covered in this last chapter, too. One such factor is collective responsibility. Specifically excluded from the discussion on general responsibility in Chapter I, it will be considered here only in the argument that collective responsibility can absolve the individual of responsibility as an agent. Another factor taken into consideration is the status of the war as just or unjust. While my discussion of responsibility will be connected primarily with how the war is conducted (jus in bello), how this responsibility is affected by the war being just or unjust (jus ad bellum) will be touched on.

The conclusion that will be argued for is that, just as an individual may be fully (morally) responsible for his actions, so, too, may a soldier be fully responsible. However, just as the ordinary agent may be less than fully responsible, based on a variety of factors, the soldier's moral responsibility may also be affected. While not an argument for reduced responsibility in general, this thesis will try to separate the strands of what actually could serve to reduce individual responsibility and what conditions would justify judgments of full responsibility.

As a final note before beginning, it must be acknowledged that I rather freely use the notion of an individual as a moral

agent with a free will. This agent is taken to have the ability to make decisions and carry out actions. All this is done without referring to any specific action theory, determinism, or libertarian position. This was done intentionally to avoid becoming entangled in the myriad of philosophical controversies discussion of these issues seem to engender. While these areas need to be examined, prudence dictated that such an endeavor be left to another time.

## Chapter I

### The Notion of Responsibility

Before proceeding to examine moral responsibility in a specific context, it will be helpful to focus on several distinctions or different types of responsibility. By doing so, one can perceive how moral responsibility relates to and is distinct from the other kinds of responsibility. H.L.A. Hart initially distinguishes four types of responsibility: role responsibility; causal responsibility; liability-responsibility; and capacity responsibility.<sup>1</sup> While Hart is primarily concerned with the legal aspects of responsibility, his distinctions can also be used to elucidate moral responsibility.

Starting with his first distinction, Hart says the following about role responsibility:

...whenever a person occupies a distinctive place or office in a social organization, to which duties attach to provide for the welfare of others or to advance in some specific way the aims or purposes of the organization, he is properly said to be responsible for the performance of these duties, or for doing what is necessary to fulfil them.<sup>2</sup>

To put this in somewhat different terms, when an individual occupies a certain position, he has the duties that go along with such a position. Such duties may be explicit, as those contained in a formal job description, or implicit. One of Hart's examples of role-responsibility is a sea captain because "... he is responsible for the safety of his ship...", a somewhat broad and vague responsibility.<sup>3</sup> As Hart points

out, this is only one of his responsibilities, as I take the ship captain to also have the duties of safeguarding cargo, crew and passengers (if any).

There are two questions that must be distinguished concerning role-responsibility, however. One is what counts as occupying a position and another is when is one (who occupies such a position) obligated to perform his duties? I will focus on this latter question and two considerations must be examined in role-responsibility. The first is how did the individual come to find himself in this position with its entangling duties? Volition appears to play a part in how responsible the person may be. If a competent ship's captain is shanghaied so that he finds himself forced to command a ship (by threat to his family or of bodily harm), is he as responsible (if responsible at all) as one who freely seeks the position?

This seems to be one of A. John Simmons' points in his discussion of positional duties.<sup>4</sup> In his example concerning the presidency (of the United States), he contrasts one individual who voluntarily chose to pursue the highest office in the land with another who is somewhat arbitrarily thrust into the job. If the former failed in his duties as President, one wants to make ascriptions of legal and moral liability-responsibility. However if the latter also fails, one does not want to make similar ascriptions. Why? "[T]he reason...is that how the president got to be the president makes all the difference in evaluating his performance."<sup>5</sup> In virtue of the fact

that the first president actively sought his post and accepted it with a full knowledge of what the office entailed, he is subject to liability-responsibility. (Whether it is of moral or legal type (or both) is a question which will be discussed later.) The person who is thrust into the job without his consent is not subject to the same. His failure to perform the duties is not enough; there needs to be more for ascriptions of legal/moral liability-responsibility to apply.<sup>6</sup>

The second consideration is an epistemic one. How role-responsible can one be if the individual was not aware that a certain duty was expected of him? To use another example of Hart's, consider the husband who, upon marrying his spouse, incurs the duty of supporting any children resulting from this union. Upon the birth of his first child and receipt of the subsequent hospital bill, he is shocked to discover he is expected to pay it. What effect does this have on his duty to, in fact, pay it? While one is inclined to respond that "everyone" knows that fathers have a duty to support their children, this roughly translates that it is commonly the case that fathers are aware of this duty. While this is the case in this example, one can consider certain roles or positions with myriad, complex duties, one of which could very well be rarely used. In this more complex case, a response of "I did not know that I was responsible for duty X!" may have its place. While only briefly mentioned as areas for further examination concerning role-responsibility, these considerations and others

will be treated in more detail later.

Before leaving role-responsibility, it is important to note its relation to moral and legal responsibility. Given that legal responsibility and moral responsibility are distinct concepts (these concepts are discussed under those respective headings), I see the relation of these two to role-responsibility as follows: One may be held morally responsible for accomplishing the set of duties A because one holds role-responsibility Y. One may also be held legally responsible for the set of duties B because one holds the same role-responsibility (role Y). While it may be the case that a specific duty in set A is also a member of set B (for which the agent is legally responsible), it is not necessary that there be any correspondence between these two sets of duties.

Simmons' analysis of the relation between positional and moral duties bears on this subject (how legal and moral liability-responsibility relate to one another). He sketches out two situations. The first has already been mentioned and is the case where the duly elected President fails to properly fulfil his duties as president. The second is the case where an army medic fails to fulfil his medical duties by leaving a tent full of wounded patients for a more pleasurable pastime.<sup>7</sup> He analyzes the two cases as distinct and typifying the two patterns one will find when positional duties seem to engender moral ones. In actuality, it is the case that it just so happened that there was a moral duty to do what the person had

a positional duty to perform. The same kind of relation seems to hold between legal and moral liability-responsibility when the person in question is in a certain role and also when the person is in no such role. However, this hypothesis must wait until the concepts of legal and moral liability-responsibility have been examined.

Before turning to liability-responsibility, it will be helpful to look at the second sense of responsibility mentioned by Hart. This is causal responsibility. In his ordinary language analysis of this specific use of responsibility,<sup>8</sup> the causal nature is immediately apparent. "The long drought was responsible for the famine in India" can be rephrased "The drought 'caused' or 'produced' the famine".<sup>9</sup> While this use of "responsible" can be applied to inanimate objects (as demonstrated by the previous example), I am concerned with its application to individuals. It does apply to human beings as one can be said to be responsible in this causal sense in the same way the famine was responsible in the example. To illustrate, "He was responsible for the gun going off." can be true independent of ascriptions of moral or legal responsibility. The agent could have caused the firearm to discharge by dropping it or pulling a string attached so as to apply pressure to the trigger, thinking he was pulling a string to switch on an electric light. In both these cases one wants to assert that the agent caused the weapon to fire but one would have to know more about

these cases before making judgments concerning moral and legal responsibility.

In contrast to causal responsibility, which can be viewed independent of moral and legal responsibility, the third sense of responsibility, liability-responsibility, is an aspect that relates directly to moral and legal responsibility. In our society today, it seems "legal liability-responsibility"<sup>10</sup> receives most of the attention. This legal liability is when one who breaks certain rules or legal conventions is required to undergo "...punishment for his misdeeds, or to make compensation to persons injured thereby, and very often he is liable to both punishment and enforced compensation."<sup>11</sup> The liability here is liability to be punished and/or pay for monetary damage(s) or fine(s). To point out how this is different from the uses of responsibility previously mentioned, one can be held legally liable (hence, held in the condition of legal liability-responsibility) without being causally responsible. Consider cases where an employer is responsible for the damage done by or actions of his employee. To use a specific instance, assume a grocery store employee sells beer to an underage consumer.<sup>12</sup> If the employee does this, the store owner is liable (subject to) a fine regardless of the circumstances surrounding the sale. Even if the beer buyer showed falsified identification so that the person at the cash register thought he (the buyer)

met the legal age requirement, the store owner is still subject to punitive action from the Alcoholic Beverage Control agency. My point here is just to show that, even though the store owner in no direct way caused the illegal sale to transpire he is still held legally liable. Although the store owner did provide a store, liquor license, liquor, etc., he did not cause the sale to occur vis-a-vis the person cause the firearm to discharge in the previous example. By being held legally liable I take him to be responsible in the sense of Hart's term legal liability-responsibility.<sup>13</sup>

Having briefly looked at liability-responsibility in the legal realm, liability-responsibility is also connected with the moral sphere as well. There are major differences, though. In the former, one's legal liability concerned one's being liable to punishment, paying compensation, or both. In the latter, one is liable to judgment in the moral realm. Thus moral judgment takes the form of praise and blame.<sup>14</sup> "These attitudes [of praise and blame] towards ourselves and towards other people..."<sup>15</sup> are central to moral responsibility. While legal liability-responsibility questions deal with whether or not one is punished or forced to compensate another party according to the law, questions of moral responsibility focus on whether or not one is justly praised or blamed for one's actions or the situation resulting from one's action. As expressed by H.L.A. Hart:

...the moral counterpart to the account given of legal liability-responsibility would be the following: to say that a person is morally responsible for something he has done or for some harmful outcome of his own or others' conduct, is to say that he is morally blameworthy, or morally obliged to make amends for the harm...<sup>16</sup>

While these terms "morally blameworthy" and "morally obliged" are used to illuminate the concept of moral responsibility, they may have to be "unpacked" also. Briefly, then, I take "morally blameworthy" to mean that one should be blamed because he has done something (morally) wrong. (Conversely, morally praiseworthy means that one should be lauded because he has done something right, again in the moral sense.) While someone may object that this is equally unilluminating by not going on to ground moral right and wrong in some (meta)ethical theory, I counter that, given the lack of an uncontroversial position on this matter, to digress into this area would not serve my purpose.

Having elucidated the notions of legal and moral liability-responsibility, it is appropriate to return to the relation between liability-responsibility and role-responsibility. To return to Simmons' (correct, I believe,) thesis that there is no necessary connection between positional duties and moral duties, it is first necessary to reconcile Simmons' terms (positional and moral duties) with Hart's. I see positional duties connected with legal liability-responsibility and moral duties connected with moral liability-responsibility.

Positional duties are those associated with a specific

position, either formally or informally. These kind of duties are formally specified in the legal machinery of the social and political system, usually by legislated law. Other positional duties are specified in an informal way. For example, it is acknowledged that elected officials are not to use their public office for personal gain. When they do so, they are violating their positional duties and are subject to censure. (Harrison William's recent case seems to be an example of this.) The point here is that positional duties are those duties that one is expected to perform by the fact that one holds that position. If one of these duties is not done, the censure that can be expected is of the legal liability-responsibility sort, punishment because one has broken the law.

Moral duties are connected with moral liability-responsibility because when one fails in a moral duty or moral obligation, one is subject to moral blame. But what about the fact that some cases of political duty engender moral duty? This would mean that if one would be legally liable-responsible, one would also be morally liable-responsible. This is exactly what Simmons' wants to deny. In the case of the Army medic who shirks his military duty to care for wounded soldiers under his care, he is legally liable-responsible under the Uniform Code of Military Justice.<sup>17</sup> He failed in his specified duty, he broke Army regulations, and is subject to punishment under the law (for that is what it is to be legally liable-responsible). He is also morally liable-responsible, as Simmons points

out, but it is not because he is subject to legal liability-responsibility. He is blamed (morally) because he had a moral duty to care for the wounded. As Simmons' states, "In the [medic] case, the existence of the positional duty was irrelevant to the moral requirement, which anyone...would have in the situation described." This is the first of two patterns: "There simply happened to be a natural duty to do what there also was a positional duty to do."<sup>18</sup>

In the case of the President who fails in his duty, he is subject to legal liability-responsibility. He had specific political duties to accomplish and failed to do them. As such, he is subject to such penalties as impeachment and possibly even incarceration (if he is taken to court). One also feels that he is morally blameworthy, too, and he is. Again, though, it is not because he is legally liable-responsible that he is morally liable-responsible. Rather, the President freely chose to assume his political position. As a result, he had a moral obligation to fulfil this positional duty. As mentioned before (sea captain example) it was not just that the position had these duties such that anyone in the position had those duties; how the person came to hold these positional duties impacts on legal and moral liability-responsibility. This, then, is the second of the two patterns: It is the way in which the position was entered that bears on questions of moral duties and moral liability-responsibility.

Simmons not only holds that these two patterns point out

how political and moral duties are unconnected, but also that he thinks these patterns are exhaustive in that whenever one has a political duty that seems to engender a moral one, one of these patterns applies. I agree and the point that carries over to legal and moral responsibility is that, just because legal liability-responsibility exists, this does not mean moral liability-responsibility must also be involved. Now, it may be the case that one person is both morally and legally liable-responsible for the same act. The point to note is that being one type of liable-responsible does not entail the other.

The fourth variant of responsibility discussed by Hart is "capacity-responsibility."<sup>19</sup> This aspect is aptly named in that the capacity of the agent is exactly what is being focused on. Such sentences as "He is responsible for his actions" imply a certain premiss and this premiss "...assert[s] that [the] person has certain normal capacities."<sup>20</sup> These capacities are "...those of understanding, reasoning, and control of conduct..."<sup>21</sup> and these three faculties need to be examined in turn.

The faculty of understanding refers to the ability of (most) human beings to comprehend the content of the legal and moral rules. While Hart prefers to say "...the ability to understand what conduct legal rules or morality require...",<sup>22</sup> I do not think he means that the agent would know specifically what to do in each situation that occurs. Hart is saying that X understands the moral position "Do not kill" in a general sense. (This is less exacting than the position where "under-

standing" would mean X knew what to do in this specific case.) This understanding in a general sense would mean that X understands "Do not kill" such that he comprehends the notion of killing, the content of the imperative "Do not \_\_\_\_", and is cognizant of the fact that this rule is at least part of a moral code. This last facet simply means he understands that killing is wrong (in a moral sense). Put a little differently, under the heading of "understanding about killing," the agent concerned would understand there is a class of acts such that these denote cases of killing and, further, that they ought (morally speaking) not to be done. This is what I take Hart to mean when X understands "...what legal rules or morality require...".

The second aspect of capacity responsibility is reasoning. Hart states this is "...to deliberate and reach decisions concerning these requirements...",<sup>23</sup> where "requirements" refers to what the legal or moral rules require. While reasoning does involve deliberating and deciding, as Hart points out, it is interesting to note how these processes fit in with the conclusions from "general thinking" (or understanding about killing). Having understood that he ought not to do these acts of killing, agent X must now apply these somewhat abstract concepts to concrete facts. Put differently, although he understands in general that killing is wrong and ought not to be done, he must recognize this situation as a potential case of killing and, therefore, he ought not to do this action.

(I take the decision not do something as qualifying as an action, even if no "action" is performed. This is also why someone can be legally or morally liable-responsible for omitting or failing to do something.) It is the practical application of the general thinking that takes place in the "reasoning" portion of capacity-responsibility. To illustrate this, consider the following case: A policeman draws his weapon and points it at a fleeing assailant. Given his conclusion (in previous thinking or understanding that to kill is wrong), he has to recognize what he is about to do, i.e., pull the trigger, is a case of killing and he, therefore, ought not to do that specific action.

At this point, it is important to identify these two aspects of capacity-responsibility as mental. Both understanding and reasoning involve no bodily movements, at least in the conventional sense. While it is true that one may have had certain physical occurrences antecedent to understanding, e.g., his eyes scanned the textbook page or he wrote out the multiplication tables ten times, his understanding itself did not consist in these physical movements. Similarly, reasoning involves the mental process of weighing various choices and deciding upon a course of action. This reasoning can be described as deciding, choosing or exercising the faculty of volition. Again, all this takes place within the mental realm.<sup>24</sup>

The third and final aspect of capacity-responsibility in-

volves a bridge between the mental and physical realms. Having decided not to kill, the policeman restrains from applying pressure to the trigger of his service revolver. If one wants to avoid the controversial issue of whether omissions are actions or not, this situation can be reworked. Having (mentally) decided not to fire at the fleeing assailant, the policeman uncocks his pistol and returns it to his holster. As can be gleaned from these descriptions, this third aspect of capacity-responsibility involves "control of conduct."<sup>25</sup> I take this to be the ability to bridge the gap from the mental decision to physical action. Put differently, given that I decide not to shoot and kill, I can control my conduct such that I do not discharge the firearm. To illuminate this capacity through an example of one lacking this ability, consider if I had been trained to point my rifle and fire when suddenly presented with a silhouette (of human shape). Having been shipped to the combat zone and integrated into my unit, I find myself point man as the squad advances down a jungle trail. Suddenly, a figure bursts from the foliage. True to my training, I instinctively raise and fire my weapon as a reflex action. I cannot be held to be worthy of moral praise or blame for doing this because I did not control my conduct; what I did was not culminate mental decision with physical action.

In this way, the specific aspect of capacity-responsibility identified by "control of conduct" is a prerequisite for moral or legal liability-responsibility. Without being able to stop

oneself from pulling the trigger, the question of whether one should be punished for doing it (legal liability-responsibility) or blamed (moral liability-responsibility) for doing so cannot arise. Similarly, if one could not have pulled the trigger because one was physically incapable of this physical action, moral praise for not doing so is not applicable. The requirement exists that one could have done it and it's just the case that one decided to do so or not to do so.

Having examined these three aspects of capacity-responsibility, it is important to see how these three components relate to liability-responsibility. Hart's point in referring to these three aspects is to demonstrate the putative foundation which is required for ascriptions of legal and moral liability-responsibility. All three of these elements have to be present in each case for the agent to be subject to liability-responsibility. As has been illustrated previously, if ability to control one's conduct is not present, ascriptions of moral or legal liability-responsibility are not relevant. The mental aspects, understanding and reasoning, must also be present for ascriptions of liability-responsibility to be applicable. As will be discussed further, it is offered as an excuse from liability-responsibility that one did not possess these mental faculties that persons normally have. Also, since both mental capacity and control of conduct are matters of degree, liability-responsibility as it hinges upon them may be a matter of degree.

### Factors Affecting Responsibility

In regard to capacity-responsibility, the relationship of this type of responsibility to moral and legal responsibility needs to be further examined. The relation between capacity-responsibility and moral/legal responsibility is roughly the same in that both (moral and legal responsibility) are said to be "diminished" (possibly even to the point where they are non-existent) when all the aspects of capacity-responsibility are not present. However, examining how legal responsibility is affected by differing aspects of capacity-responsibility will bring out technical distinctions that will facilitate the examination of how moral responsibility relates to capacity-responsibility.

The main challenge to capacity-responsibility comes from questioning the fact that an agent does possess the threefold abilities associated with this distinct type of responsibility. As previously mentioned, Hart delineates three capacities of understanding, reasoning, and control of conduct. These first two aspects can be commonly described as mental. It is assumed that the average person has those abilities normally ascribed to human beings. Put differently, it is assumed unless proven otherwise, that the individual involved does understand and can reason. In order to lessen the legal liability of the person accused of breaking the law or even to absolve him of it completely, one tactic is to demonstrate that he does not, in fact, possess

all of the normal mental abilities.

Since it must be demonstrated that the mental faculty must be affected so that the agent lacks the normal (mental) ability, there are several ways of attempting to do so. Perhaps the most common plea is that of insanity. In other words, due to the individual being insane, he did not possess the normal (mental) human faculties of understanding and/or reasoning. The legal system has divided impairments of these mental capacities (understanding and reasoning) into two broad categories based on origin. These two types are extrapsychic and intrapsychic.<sup>26</sup> This distinction hinges on how the incapacitation or decreased mental faculty occurs. Extrapsychic impairments are those that are produced by "...external intervention upon normal functioning."<sup>27</sup> Examples of extrapsychic impairments are drugs, alcohol, hypnotic suggestion, emotional shock, or a brain tumor. A further complication may arise when one treats cases of alcohol or drug abuse by the agent concerned. The user may attempt to say he is not responsible (or not fully responsible) for his actions because he was under the influence of a certain drug at the time. The complication may occur even if one will grant him this diminished responsibility with respect to his action while in the grip of the drug because the question still remains as to whether or not he should be held responsible for taking the drug in the first place. The case where he ingested the substance because it was surreptitiously mixed with his food seems distinctly

different from the case where he took the drug because of the effects it would have on him. How liable the agent is for judgment of the legal and/or moral type is an open question in the latter case. In the former case, it seems clear that the person is not responsible for taking the drug since he did so without knowing what he was doing.

In contrast with extrapsychic impairments, ones of the intrapsychic kind are considered to come from within. While the question of "from within what" is a good philosophical question in its own right, it is currently considered that the impairment originates in the mind of the individual being considered as responsible or not. As such, intrapsychic impairments are any number of disorders known as mental illnesses. One specific example would be schizophrenia.

In considering these two categories in relation to each other, it is often the case that extrapsychic impairment is more readily accepted as an excuse than the intrapsychic one, at least within the legal system.<sup>28</sup> This seems to be a function of verifiability because it is much easier to establish the existence (or lack thereof) of something that is externally affecting an individual's mental capacity as opposed to a purely internal abnormality. Put differently, it is easier to establish that the person concerned was laboring under conditions of extreme emotional stress (his wife had just left him, his mother had just died, his business went bankrupt, etc.) than it is to prove that an agent has a bonafide paranoia such that he thinks

all strangers are out to kill him. Again, since it is presumed (or perhaps analytic) that a normal or average person has unimpaired mental faculties, it is necessary that this impaired status be proved and, since deception is easier in the case of intrapsychic impairments, alleged instances of this type are often treated skeptically.

Given that judgments concerning mental abnormality affect how legally liable an agent may be, there has grown up a body of technical rules concerning this area in the legal system. For example, the plea of insanity is most often treated under the M'Naghten rules (or some variation).<sup>29</sup> The first of these two rules allows that the accused was not legally liable/responsible if he did not know "...the nature and quality of the act he was doing, or he did not know that it was wrong, because [he] labor[ed] under a defect of reason [caused by] disease of the mind."<sup>30</sup> This concept of the agent not knowing the nature and quality of his act can easily be illustrated: consider the case where a man awakes to find himself fighting a bear in his bedroom. In actuality, it is his wife and he kills her, thinking she is an attacking she-bear.<sup>31</sup> According to the M'Naghten rules, the agent is not guilty of murder because, at the time of the action, he really thought he was fighting off a dangerous animal. It may even be that case that the person who did this would admit that killing one's wife was murder and murder is wrong. It's just that he did not know that the "quality and nature" of what he was doing was murder; he thought he was

wrestling a bear. Further, the M'Naghten rule specifies that this delusion must occur as a result of a defect of the mind, where the defect can be extrapsychic or intrapsychic.

Even if the accused did know the quality and nature of his act, he may still be found insane under the second proviso of the M'Naghten rules. If he knew what he was doing he would be excused from (legal) liability if and only if at the time of the crime the person "...did not know what he was doing was wrong."<sup>32</sup> Of course, "wrong" is ambiguous: It can be taken to be "morally wrong" or "against the law" (legally wrong). In this context, it seems the latter is more appropriate. To illustrate this second aspect of the M'Naghten rules, consider the case where a person strangles his spouse, admits fully to doing it, and finishes his confession with, "...and what's all this talk of 'against the law', anyway?" A person who lacked the (mental) capacity to appreciate that murdering another human being was wrong would be considered insane. While it can be said that the husband knew what he was doing (he intentionally put his hands around her neck and squeezed), it can also be said that he did not know (nor was he capable of knowing) that throttling his wife was wrong. It is important to note that this is not ignorance of fact in that he just failed to seek the information that murder was against the law or just received wrong information (such as murder was not against the law). The person concerned lacked the mental ability to understand what the concept of wrong was all about or at least lack-

ed the ability to apply the concept in the case in which he was involved.

While there are treatments of insanity in legal systems other than the M'Naghten rules and it must be noted all these treatments deal only with legal liability-responsibility, examining the M'Naghten rules brings out two things. First, it demonstrates that the treatment of mental impairment in the legal realm is developed and often technical. Secondly, the distinctions discussed do bring up salient aspects of the responsibility that can (and will be) used in discussing moral liability-responsibility later on.

The insanity plea is not the only manner in which one's mental activities may be affected. Two other ways, which are interrelated, are ignorance of fact and mistake of fact. Both these can occur when the person involved has normally sound mental faculties. It is just that another factor has changed the character of his action.

It may be necessary to point out the somewhat technical distinction between mistake and ignorance. In regard to the former, being mistaken is being ignorant in a certain sense. For example, when asked what day of the week it is, A replies, "It's Tuesday." (He genuinely believes it is Tuesday but it really is Monday.) He is mistaken because he takes it to be a certain case yet, in actuality, it is another. Ignorance of fact, in contrast to this, refers to the case where, when B is asked what day of the week it is, B replies he does not know.

Given the aforementioned definition of mistake of fact, ignorance of fact is any case of "not knowing" other than mistake of fact. The common factor in both mistake and ignorance of fact is that there is a lack of certain epistemological conditions. The agent involved is not aware of the situation such that he does not know or recognize the actual facts, circumstances, or state of affairs surrounding him.<sup>33</sup>

Along with ignorance of fact there is an associated area that also bears on responsibility. This is the area described by the term "accidentally". An illustration is the following:<sup>34</sup> A golfer sets his ball on the tee and swings. He concentrates all his effort on hitting the ball so as to drive it towards the green. He hits his ball and it slices to the right, smashing through a window of a house adjacent to the golf course. The golfer can be described as having accidentally broken the window. The term "accidentally" is justifiably used because of the golfer's intention at the time of his action. The golfer did not intend to smash the window; what he meant to do was (at the very least) keep the ball on the course. This brings up the issue of intention and how it affects responsibility. While it is clear the golfer is causally responsible for the broken pane of glass, it is not clear that he is responsible in that he should be morally liable. Put differently, blaming him for his action may not be appropriate.

These three areas, mistake of fact, ignorance of fact, and accident, all impact on moral and legal liability-responsi-

bility. One must consider the individual case to discern how these factors, either jointly or individually, affect moral and legal liability. As a general rule, when such factors are present, responsibility (in the legal and moral sense) may be diminished. (This assumes no negligence.) This accords with our intuitions on this matter, especially when one narrows the discussion to moral liability-responsibility.

A consideration that has been skirted so far but has a bearing on the responsibility question is one which is connected to cases of ignorance of fact and accidents. This consideration is negligence. The reason negligence plays an important part in ascriptions of moral and legal liability-responsibility is because of its function, where this function is to nullify pleas of ignorance or accident. For example, in the golfer case, one was inclined to hold the golfer was not subject to moral blame because he had accidentally broken the window; he did not intend to do the damage. However, one would not be so ready to exonerate him if he was target shooting by placing a tin can on top of a fence post in his small back yard while directly behind the target stood a school playground. Given this scenario for a tragic accident, a child could be seriously injured, even killed, by a stray bullet. In such an instance, the shooter's claim that "he did not intend to hurt a child" is rather lame.

The reason it is lame, even if it is true, is because the agent is deemed to be negligent. The term is used such that

he failed to apprehend the dangerous consequences of his action and he should have foreseen them. This latter part of the conjunction brings in the concept of capacity-responsibility in that it refers to the mental capacities (understanding and reasoning) that a person has, given that he is a rational human being. To return to the negligent shooter, he is blameworthy due to the fact that he failed to discern that what he was doing was dangerous. Further, because of the hazards associated with such dangerous weapons, he failed to take the proper precautions required for safe target shooting. Even further, the most telling point is that he should have perceived these possible consequences because the average person would have, given the same or similar circumstances. Put a little differently, everyone knows that, due to the nature of firearms, discharging them in densely populated areas is dangerous.

The notion of negligence, then, is concerned with the failure to exercise the care a prudent person would exercise. The problem seems to occur when examination turns to this idea of a "prudent person". While it is impossible either to point to or construct an "average human being" or prudent person, it does make sense to talk about what most people would consider dangerous. While it would be difficult in so called "border-line" cases where it is not clear that such and such an action is dangerous (and the agent is negligent for failing to perceive this), these difficult cases do no work as far as demonstrating that this concept is of no use whatsoever.

Since the concept of negligence hinges on the idea of how dangerous a consequence of the action is, a brief look at the notion of "dangerousness" may be helpful. The concept of dangerous seems to have two components.<sup>35</sup> These are how much risk is there that the consequence will occur and of what magnitude is the harm contained in the consequence. Given these two variables, there are three cases where a situation can be termed dangerous. The first is the situation where an action has both a high probability that harmful consequence will occur and the magnitude of such a harm is great. (While the concept of harm is being utilized here, no further attempt will be made to illuminate it other than to state that harm can be of varying magnitudes, e.g. while one will say harm occurs when one cuts one's finger while slicing tomatoes with a sharp knife, this is certainly less harmful than chopping the digit off completely.<sup>36</sup>) To return to a previously used example, one would say the target shooter's action was dangerous on both counts: there was a high probability (or the risk was great) that someone would be injured and the magnitude of the possible harm was great in that someone could have been killed or seriously injured by one of the bullets.

The remaining two cases of "being dangerous" exist when only one element of the two is great: the first situation is where the harm contained in the harmful consequence is not very great yet the probability that it will occur is very large. Secondly, the case is considered dangerous where the

probability may not be very great (in that it is fairly remote that harm will occur) but the harm risked is serious. An example of the former would be driving a nail without paying attention to one's action. Given that one holds the nail in the fingers of one hand and swings the hammer with the other, this is dangerous because there is a high probability that one will smash his finger but this harm is not that great. (It is not great because the injury is not serious, permanently incapacitating, etc.) An example of the latter would be the failure of an airline mechanic to check a certain crucial part of the jet engines. Even though these particular engine parts have proven to be extremely reliable (such that their failure rate has been very low), the mechanic's action is considered dangerous because, if the parts do fail, the ensuing plane crash might kill hundreds. In this case, the risk that such an action will lead to harm is very small but, due to the magnitude of the possible harm, it is considered dangerous.

Of course, the fourth possibility given these two variables is where both the risk (probability that the harm will occur) and the magnitude of harm are not very great. In this case, this is not dangerous at all. Put differently, if chances are slim that a certain event will occur and even if the event occurs the ensuing harm is minimal, this combination of low risk and small magnitude of harm is not considered dangerous at all.

In addition to mental abnormality, ignorance of fact, and

negligence, there exists yet another factor affecting responsibility. This factor is coercion, or 'duress' as it is referred to in the legal realm. This is where the choice of the individual agent is so affected by violence or threat of violence that one would question whether choice really exists. Aristotle refers to a situation that one thinks of as a paradigm of coercion: "A tyrant orders one to do something base, having one's parents and children in his power, and if one did the action they would be saved, but otherwise would be put to death."<sup>37</sup> While Aristotle feels this situation does not excuse all actions, e.g., he thinks anyone who commits matricide blameworthy under any circumstances, most are willing to grant that coercion does affect how responsible (in the liability-responsibility use of the word) the agent is, where this coercion or duress lessens how liable the agent is to be held in both morally and legally respects.

There are several facets to this notion of coercion. At least one aspect of coercion can be made clear by contrasting it with compulsion. Consider two cases: X is coerced into doing A and Y is compelled to do A. It is a case of the latter when one has the irresistible urge to do something. An illustration of this would be a kleptomaniac, who is compelled to steal things because of this unique mental aberration. It is a case of the former when X steals because he is threatened with certain consequences if he does not steal.

One distinction that is obvious is that, even though the

actions performed by X and Y are similar (in that they both stole something), there was no threat involved in Y's case. Therefore, it seems that the presence of a threat, implied or explicit, is necessary for coercion to occur. This is not the case with compulsion, however. Even though Y was forced (by his mental illness) to steal, he was not forced by means of a threat.<sup>38</sup> Another way of looking at this would be to see compulsion as the set of acts where one is forced to do something and coercion as a specific subset of these acts where the person involved is forced to do something by means of a threat, implied or explicit.

This last mentioned distinction may not be quite right, however. There seems to be a further distinction between compulsion and coercion that involves the notion of choice. In the compulsion case, the kleptomaniac seems irresistibly drawn to steal no matter what he wants to do. Put a bit differently, he may realize he is a kleptomaniac but, no matter how much he wishes or wills that he would not steal, he has no choice but to steal. In the coercion case, X steals because the threat has altered the relative utilities of the alternatives. Kidnappers may have X's wife and children in their power and have threatened to kill them unless X steals a secret document for them. While X may be "forced" to steal, he is not "forced" in the same way that the kleptomaniac is "forced." The distinction here is that there is no choice involved in Y's stealing; Y has no operative free will. In contrast to this, X does

have free will in that he could choose otherwise. He could choose not to steal the document even though serious consequences would (probably) follow.

Of course, the idea of a reasonable choice enters into the hypothetical coercion case mentioned above. While X has an actual choice in that he is not constrained to steal in such a way that he could not do otherwise (he could choose not to steal the secret document), it may not be reasonable for him to refrain from to steal it. While actual choice may exist, the context of the situation dictates that the reasonable thing to do is to steal, given that the agent involved deems the continued existence of his family as more important (to him) than the continued secret status of this document. Given that compulsion, at least in this strong sense, does not seem to involve choice or an agent's (free) will at all, it may not be completely accurate to describe coercion as a type of compulsion. This is because the coerced agent's will is involved in that it is influenced. It is not that it is non-existent as in the kleptomaniac's case; it is present and it is what is being affected.

A further aspect of coercion can be discerned by looking at the same hypothetical case with a minor context alteration: X's family is kidnapped by his nation's rival government and the kidnappers demand that X provide them with the secret document. Unbeknown to the kidnappers, however, X has become disenchanted with his government and had already decided to

turn over the secret to his nation's enemy. He complies with the kidnappers' wishes which happens to be what he was going to do anyway. Was X coerced or not? I would say he was not because this case lacks an element important for a case of bona fide coercion to occur: In order to be coerced, X must do something that he normally would not have done. To use an (admittedly vague) philosophical phrase, a person can only be said to be coerced if he does something under threat that, ceterius paribus, he would not have done.

Having stated that a case of coercion occurs when one is forced by threat to do something he normally would not have done, what constitutes a threat? As noted by Nozick, a threat need not be verbally expressed.<sup>39</sup> All that needs to be established is a situation where one has grasped the idea that unpleasant circumstances will occur should he (the agent being coerced) not do something. While this situation is usually established verbally, it need not be so. To sketch a non-verbal case, consider the following illustration: Two prisoners of war are brought into the interrogation room. The interrogator asks the first enemy soldier if he wants to answer his questions. The first soldier says no and is subsequently shot on the spot. The interrogator then turns to the second captured enemy soldier and asks him if he wants to answer the interrogator's inquiries. Given the context of this situation, no verbal threat need be expressed. The second POW realizes that if he refuses to cooperate, he will be shot, just as the first soldier refused to

cooperate and was shot.

Having established that a threat need not be verbal, it may be helpful to further distinguish what a threat is. A threat is the act by which an agent is gotten to believe unpleasant consequences will occur if he does not comply with the desire or wishes of the coercing party (where these desires/wishes are explicit or implied). A salient feature of a threat is that the consequences are viewed as undesirable or unpleasant by the (potential) recipient. One would not consider oneself threatened if the consequence of not complying with the wishes of the coercing party is something the agent being pressured really desires, even if the action the agent is being forced to do is something he normally would not do. If a politician votes against a bill (and he doesn't want to vote this way) because he has been told he will receive several thousand dollars if he voted for the bill (and he wants the cash), one would question if the politician was rational. Questions of rationality aside, this situation does not fit the model of being threatening. In order to be a threat, the promised consequence has to be unpleasant to the agent so that it serves as a negative motivational force in that it's something he wants to avoid. To return to the coerced politician case, if the politician votes against the bill (which he wants to vote for) because the gangster element has promised to break both his legs if he doesn't vote against the bill (and, naturally, he does not want his legs broken), then he has been coerced.

Put a little differently, a threat is an act that serves to deter or inhibit the agent from doing what he would normally do or want to do.

Given this notion of threat, it makes sense to talk of magnitudes of the threatened harm. This is an important consideration because it affects judgments of legal and moral liability-responsibility. This can be illustrated by using Frankfurt's example: P threatens to step on Q's toes if Q does not set fire to a crowded hospital.<sup>40</sup> Q sets fire to the building and Q tries to escape liability-responsibility, claiming that he was coerced. While he was threatened (in a rather trivial way), one does not feel much sympathy for Q. This seems to be because the magnitude of the threatened harm is a factor in considering ascriptions of legal and moral liability-responsibility. Even if (in Q's case) one were to "up-grade" the threat to a broken thumb, one would still feel that the harm of the threat pales in comparison to the harm to be caused by firing a crowded hospital building.<sup>41</sup> My point here is that the magnitude of the threatened harm affects how much one wants to accept it as mitigating the liability-responsibility for Q's action.

There is a role that coercion may play that would obviate any discussion of liability-responsibility, though. If one wants to allow (as Frankfurt does<sup>42</sup>) that, at least in some cases, coercion excuses one from any moral liability-responsibility, then one must ask how this is done. It can be done by

referring back to capacity-responsibility. If the potential victim of the threat is so terrified that he has no alternative but to comply with the wishes of his coercers, he no longer is capacity-responsible, with the result that he is not subject to ascriptions of liability-responsibility. As previously mentioned, capacity responsibility (with its three components of understanding, reasoning, and control of conduct) is a prerequisite for judgments of liability-responsibility. If the agent being threatened is so overcome by the potential harm such that he cannot do anything but comply, he has lost the ability to reason. He, in effect, is in the same status as the insane person; neither are fit subjects for ascriptions of liability-responsibility. In this way and this way only I see coercion functioning to excuse from legal and moral liability.

This is the extreme type of case I see Frankfurt as describing when he states:

Now coercion requires...that the victim of a threat should have no alternative to submission, in a sense in which this implies not merely that the person would act reasonably in submitting and therefore is not to be blamed for submitting, but rather that he is not morally responsible for his submissive action.<sup>43</sup>

If this is the actual case, this seems more like a case of compulsion rather than coercion. Just as the kleptomaniac could not stop himself so, too, it seems the "coerced" person in this case is compelled to follow the course of action designed to avoid the threatened harm. In this way, this excusing case of coercion may be better labelled a case of compulsion.

What about the case where one is not reduced to a quiver-

ing mass of flesh by the threat? While one can acknowledge that some may be so affected by threats, many will not. They will continue to reason by weighing the now somewhat doctored utilities of the various options and decide what to do. To put this differently, their capacity-responsibility is preserved. In these cases, I think the agents are responsible for their actions and they can be held legally and morally liable-responsible. This is not to discount the admittedly great influence of the threats, however. The presence of the threats should be taken into account as far as mitigating or lessening how liable-responsible the agent should be held. To return to the politician case, one may want to hold the politician responsible (in the sense of being legally and morally liable-responsible) for voting against the bill, but one also wants to lessen his responsibility based on the circumstances. Also, as previously mentioned, how liable-responsible he is to be held is a function of how serious a harm he is actually threatened with.

Before going on, this may be an appropriate time to explicitly bring in a notion that has some intuitive appeal. This is the notion of degree of responsibility that has been mentioned before. Nozick makes use of this idea when he discusses what he labels "r-factor", where this r-factor is the agent's degree of responsibility which can vary from 0 to 1.<sup>44</sup> With this variable nature of one's r-factor, one can be fully responsible ( $r = 1$ ), less than fully responsible ( $0 < r < 1$ ,

such as when mitigating circumstances are present), or not held responsible at all ( $r = 0$ ). I take this latter case to excuse the agent altogether. As to how this  $r$ -factor interrelates with the previously used responsibility terms, for purposes of fixing liability-responsibility, the agent who is causally responsible may be held legally and morally responsible anywhere from  $r = 0$  to  $r = 1$  (depending upon his circumstances). It is also thought that capacity-responsibility may be held to degrees, also, as someone's mental capacity may exclude him from full responsibility for his actions yet not absolve him totally. Even causal responsibility, while usually thought of as  $r = 1$  or  $r = 0$  (corresponding to he either did it or did not do it), may be considered differently. An agent could be taken to be partly causally responsible in that his effort or effect was conjoined with effects caused by other agents, inanimate objects, animals, etc.

While this somewhat mathematical way of looking at responsibility (as  $r$ -factor) has been introduced, this is not meant to give the false impression that such quantification is a precise process. As of yet, there is no equivalent of the logarithmic tables where one can "look up"  $r$ -factor to the third decimal place. The only point here is that Nozick's somewhat formal way of characterizing a sliding scale of responsibility accords with putative intuitions and, further, this concept can be applied to some of Hart's responsibility

terms already elucidated.

There is one final comment on coercion. It is commonly thought that some crimes are so heinous that, no matter how great the harm with which one is threatened, one cannot be excused from responsibility. To mesh this with previous discussion, it has been suggested that there are certain cases of coercion where the threatened agent is so terrified that he loses his capacity-responsibility. In such instances, the "agent" would always be excused from liability-responsibility. Given that these cases are excluded from consideration, there do seem to be cases where one choosing to do something is not mitigated to such a degree that one's r-factor goes to zero, to use Nozickian terms. If one had some degree of capacity responsibility, and he was (at least partially) causally responsible, then he is subject to some degree of liability-responsibility, even if coerced. Further, to what degree one is liable-responsible will be affected by mitigating circumstances.

## Notes

<sup>1</sup> H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law (Oxford: Oxford University Press, 1968), p. 212.

<sup>2</sup> Hart, p. 212.

<sup>3</sup> Hart, p. 212.

<sup>4</sup> A. John Simmons, Moral Principles and Political Obligations (Princeton: Princeton University Press, 1979), pp. 17-23.

<sup>5</sup> Simmons, p. 19.

<sup>6</sup> Simmons, p. 19.

<sup>7</sup> Simmons, p. 18.

<sup>8</sup> Hart, p. 214.

<sup>9</sup> This example is Hart's. Hart, p. 214.

<sup>10</sup> Hart, p. 215.

<sup>11</sup> Hart, pp. 215-16.

<sup>12</sup> This example may be further complicated by the fact that these laws concerning liquor sale violations are strict liability laws, where one can be held guilty or liable regardless of the mitigating circumstances.

<sup>13</sup> It is not clear that Hart would acquiesce to my equating these two. Hart, pp. 216-17.

<sup>14</sup> Jonathan Glover, Responsibility (New York: Humanities Press, 1970), p. 1.

<sup>15</sup> Glover, p. 1.

16 Hart, p. 225.

17 Article 86, Manual For Courts-Martial, United States (Washington, D.C.: Government Printing Office, 1969), p. 28-14.

18 Simmons, p. 20.

19 Hart, p. 227.

20 Hart, p. 227.

21 Hart, p. 227.

22 Hart, p. 227.

23 Hart, p. 227.

24 This Cartesian premise must be recognized as such. I do not argue for this position but use it as a premise.

25 Hart, p. 227.

26 Hyman Gross. A Theory of Criminal Justice (New York: Oxford University Press, 1979), p. 293.

27 Gross, p. 293.

28 Gross, p. 294.

29 M'Naghten's Case, 10 Clark and Finn, 200 (1843). This case plays a definitive role at least in Anglo-American legal systems.

30 Hart, p. 296. This formulation is the first part of the M'Naghten rules according to Hart.

31 Anthony D. Woosley, Section I of Philosophy Course 368, University of Virginia, Charlottesville, 07 April 1981. This example used by A. D. Woosley in class lecture.

32 M'Naghten's Case, 10 Clark and Finn, 200 (1843)

33 Since mistake of fact and ignorance of fact are similar in that mistake is a particular kind of ignorance of fact, further (separate) treatment of mistake of fact will be deleted. References to ignorance of fact should be taken to include mistake of fact as well.

34 Anthony D. Woozley, Section I of Philosophy Course 368, University of Virginia, Charlottesville, 31 March 1981.

35 Anthony D. Woozley, Section I of Philosophy Course 368, University of Virginia, Charlottesville, 19 February 1981.

36 For further discussion of harm see the following: Joel Feinberg, Social Philosophy (Englewood Cliffs: Prentice Hall, Inc., 1973), pp. 25-31.

37 Aristotle, Nicomachean Ethics, trans. David Ross, rev. J. L. Akrill and J. O. Urmson (Oxford: Oxford University Press, 1980), p.48 (Book III, Part I).

38 There are some writers on coercion who feel one can also be coerced by offers as well as threats. I do not hold such a view and limit my discussion of coercion to threats. For opposing viewpoints see Virginia Held, "Coercion and Coercive Offers", in Nomos IV: Coercion, eds. J. Roland Pennock and John W. Chapman (Chicago: Aldine Atherton, Inc., 1972), pp. 49-62 and Vinit Haskar, "Coercive Proposals (Rawls and Gandhi)", Political Theory 4, No. 1 (February 1976), 65-79.

39 Robert Nozick, "Coercion," in Philosophy, Science and Method: Essays in Honor of Ernest Nagel, eds. Patrick Suppes, Sidney Morgenbesser, and Martin White (New York: St. Martin's Press, 1969), p. 444.

40 Harry G. Frankfurt, "Coercion and Moral Responsibility," in Essays on Freedom of Action, ed. Ted Honderich (London: Routledge & Kegan Paul, 1973), p. 76.

41 Frankfurt, p. 76. Frankfurt does this so as to avoid the criticism that P's threat is trivial.

42 Frankfurt, p. 77.

<sup>43</sup> Frankfurt, p. 77.

<sup>44</sup> Robert Nozick, Anarchy, State, and Utopia (New York Basic Books, Inc., 1974), p. 60.

## Chapter II

### The Rules of War and Their First Function

Having examined several aspects of responsibility in general, the focus can now be restricted to the specific context of responsibility within war. As a starting point for examination of this area one can turn to the traditional standard of conduct within war. This standard referred to has been the yardstick by which persons accused of war crimes have been judged. This yardstick consists of those rules associated with the conduct of war where these rules have emerged historically.

From (and even before) the time of the legendary, chivalric knights of the Middle Ages up to the more formal Hague Convention (1907) and Geneva Convention (1929), there have been certain rules that those who engage in war are supposed to follow. Exactly what these rules accomplish (or are supposed to accomplish) will have to be examined. Before going further, though, it will be helpful to formally characterize the "war convention." This is Walzer's term and he defines it:

"[The war convention] is the set of articulated norms, customs, professional codes, legal precepts, religious and philosophical, and reciprocal arrangements that shape our judgments of military conduct...."<sup>1</sup>

This captures the notion of the rules of war and, to avoid confusion, this war convention will be referred to as the rules of

war.

As to what the rules of war do, Wasserstrom is right when he says they specify "...two sorts of things: how classes of persons are to be treated in war, e.g. prisoners of war, and what sorts of weapons and methods of attack are impermissible...".<sup>2</sup> Put in terms of classes, the war convention can be viewed as doing two things. First, it specifies the classes of combatants and noncombatants. This distinction, in its broadest sense, specifies who can be attacked (combatants) from those it is forbidden to attack (noncombatants). Given this distinction then, the second function of the rules of war is to designate what means are appropriate or allowed in combat between combatants.<sup>3</sup>

There is a general challenge to the idea of morally binding rules of war, however, and this needs to be recognized. Some claim that the area of war is so far removed from normal human affairs that moral rules have no place. This view can be labeled "moral nihilism" and it is, roughly, the position that there can be no (moral) wrong when it comes to activities in war. To put this in terms of liability-responsibility, the moral nihilist holds that there can be, in principle, no ascription of (moral) liability-responsibility when the actions of the agent concerned occur in war; by its very nature war is an activity that excludes such ascriptions. The result of this view is that one cannot discuss responsibility in war or, as Wasserstrom states, at least "...a skepticism as to the

meaningfulness of any morality within war..." occurs.<sup>4</sup>

What will be argued is that "moral meaningfulness" exists in war and applications of liability-responsibility are appropriate as well. Against the moral nihilists, one only has to look to at least one case where moral distinctions occur in war. Note that the claim is not just that moral distinctions are made. The nihilist does not deny persons make such distinctions. His claim is that such distinctions (and the judgments they engender) are not true (or false) ones. What will be argued here is that a distinction is made and that there actually is a moral distinction at work here.

Such an actual distinction is the one sought to be elucidated by the rules of war, viz. the distinction between combatant and noncombatant. Of course, put in crudest terms, the distinction here is between those who can be attacked and those who cannot. Further, this "can" does not apply simply in a broad sense of who could possibly die from attack; given just the history of the past century, it has been shown all members of any nation (to include neutrals) may be killed in war between two nations. Rather, the "can" refers to who can legitimately be attacked such that, other things being equal, no negative moral liability-responsibility attaches to the attacker based on his actions, i.e., it was not a forbidden kind of attack.

Given that such attacking of one group by another involves killing (but not necessarily so, as will be argued

later), some want to take the position that all killing is wrong. No legitimate distinction can be drawn in war such that it is not morally wrong to kill this group but morally wrong to kill that group.<sup>5</sup> This view denies the distinction between combatants and noncombatants and, while such rabid absolutism does appear to have some historical foundation (at least according to some theologians<sup>6</sup>), it ignores at least one acknowledged moral distinction made outside the war context. This moral distinction just mentioned occurs in the area of self-defense and, by demonstrating such a distinction exists, this will disprove the claim that any killing is wrong.

When an agent X is the object of an unprovoked attack by Y such that X discerns Y is out to kill him [X], it is morally justified that X kill Y. It must be recognized, however, that the self defense plea involves the further condition that X could not plausibly use another means of nullifying Y's attack. It is assumed this condition obtains in X's case. The point here is that, while not all killing is justified, some cases of killing are justified. If such a distinction (between just and unjust killing) can be drawn outside of a war context, what is so implausible about drawing such a distinction within war?

Not only is such a distinction plausible, but the claim is that there is such a distinction and such a distinction is drawn between combatants and noncombatants. Like the self-defense distinction, too, this distinction revolves around the idea of threat. Fullinwider recognizes this when he states

only those "...who pose [an] immediate and direct jeopardy [to the enemy] ..." are justifiably liable to be killed (by the enemy).<sup>7</sup> This threat idea has to be further refined, however, in order to make clear that true combatants do cause a threat. Questions of how the two opposing forces arrived on the battlefield aside, the situation where infantrymen from one side are advancing towards entrenched enemy infantry of the opposing side presents a case where both sides present a clear, present threat to the other.<sup>8</sup> Given that a mutual threat exists, it is proposed that both sides can seek to destroy the other, because both are combatants. Just as X could justifiably kill Y, so one soldier who is threatened with death can kill his opponent.

Noncombatants, on the other hand, are those who do not present a threat. While some "border-line" cases present difficulty because they involve judgments, this type of difficulty is not unique in morality. (An example of this is, given that murder is wrong, is abortion wrong? The question here seems to be whether abortion does or does not fall into the class of acts denoted by murder; it is not a question of whether murder is (morally) wrong.) This distinction between combatant and noncombatant is made more obvious by comparing the two extremes: consider attacking, armed enemy soldiers of nation B and the children of nation B. While it is clear that the former present a very real threat to the soldiers of nation A (assuming A and B are at war), it

is also obvious that the latter group presents no such threat. Again, one group is distinguished from the other based on the aspect of threat.

It may be argued that being a threat is not the only thing that makes a combatant a legitimate object of deadly force and, in a certain way, this is true. To return to the self defense analogy, X is justified in killing Y in self defense provided there was no other way to avoid Y's attack. If X could have simply run away or paralyzed Y temporarily with some sort of special martial arts blow, the killing would not have been justified. As the object of attack, however, X is not required to unduly risk himself while seeking to nullify Y. If he can just as easily run away as kill Y, he should do the former. If he can only run away by turning his back on Y (and, therefore, only possibly getting away) or he can kill Y, he is justified in doing the latter. To return to the soldier's case, if he could nullify the attacking infantrymen in some manner other than killing or wounding them, he should. It is just the case that, given his situation and the means available, the only way he can nullify their threat is through violent means.

To return to the notion of threat that is central to combatant, Nagel illuminates it when he states:

The threat presented by an army and its members does not consist merely in the fact that they are men, but in the fact that they are armed and are using their arms in pursuit of certain objectives.<sup>9</sup>

The "members" referred to above are the combatants and the threat they produce is a function of the fact that they are equipped

and trained to kill. Given the further fact that they are on the battlefield, they consider the opposing side the enemy, and their objective is to defeat the enemy by violent means; they are a viable threat. It is not that they seek to merely infringe rights or deprive the enemy or his property. They seek his life in the course of defeating his nation. While magnitude of harm was mentioned earlier in connection with threat in broad sense of anything contrary to the interests of the person being so deprived, the notion of harm that is at work here in the realm of combatants is of the most serious kind, e.g. wounds, maiming, and death.

Now come the problems: Having stated that this distinction revolves around a threat, there are (supposedly) difficult cases that are immediately presented by critics. Granted that to intentionally kill combatants is not morally wrong because of the threat they cause, what is the status of an attacking infantryman who is killed by a bomb dropped by an aircraft from twenty thousand feet up? One could question how this infantryman, armed only with a rifle, could be thought to present a threat to the personnel flying the aircraft. This criticism challenges the idea that the reason combatants are combatants is because they pose a threat. This, if granted, would eliminate the condition by which they (combatants) could be justifiably killed. To return to the infantryman-bomber case, the only reason the infantryman could be killed was because he was a combatant. If he was not a combatant, then he could not (justi-

fiably) be killed and, since he did not present a threat, then he is not a combatant and, therefore cannot (justifiably) be killed.

This way of thinking is, in my opinion, faulty in that the notion of threat at work here is very narrow. While it must be granted that one armed only with rifle poses absolutely no threat whatsoever to the crew of a high attitude bomber, it is not necessarily true that the infantryman poses no threat to anyone. This can be illustrated with the following hypothetical situation. Ground forces of nation A are attacking fortified positions occupied by soldiers of nation B. Nation B's soldiers are a very real threat to soldiers from A. (This can be established by having the first attack repulsed, with heavy casualties.) The commander of the attacking group calls for an air strike on B's entrenched troops and high attitude bombers drop their ordnance on B's soldiers, killing (some of) them. While it is still true that B's soldiers offered no threat to A's aircraft crew, it was not true that no threat existed to any soldier or individual of nation A from soldiers in the fortified defensive line. Since the soldiers who received aerial bombardment did pose a threat (to B's attacking force), they were actually combatants and could legitimately be killed.

More difficult cases can be brought up. One consists of a soldier who is a sentry guarding an installation behind the lines. He is crept up on and stabbed in the back, killed by

commandos who have come to destroy the same installation. It is supposed that, in this case, the sentry did not pose a threat. The opposing force was so well trained in stealth that they were able to silence the sentry without him discovering them. While admitting no actual threat was offered by the sentry, it is important to retain the idea of potential immediate threat. As it turned out, the sentry did not have a chance. However, given the simple addition of a dry twig crackling underneath the foot of the approaching commando, the whole scenario could have changed in an instant. The sentry could have wheeled and fired, killing the attempted stabber and further alerting the remaining guards and garrison. Their surprise attack now discovered, the commandos are then subject to the very real possibility that they will be eliminated. The point here is that, while it turned out that sentry was no threat, he very likely could have been. Also, since he was out there with the express purpose of guarding something from someone and he was armed, this establishes he was a credible threat in the first place.

Recalling again the self defense case and the condition that a less severe means was not available, this applies in this sentry example, too. If the attackers had possessed some weapon along the lines of a tranquilizer gun whose dart injected a drug which immediately paralyzed the victim (with no harmful after effects, of course), they would not be justified in killing the sentry. Similarly, if he could have been incapaci-

tated by a blow, the attackers should have used that means. However, it being that it is just the case that no such wonder-weapons existed or were available, the attackers used the least severe means available to them to nullify the potential threat of the sentry. Unfortunately, especially for the sentry, this "least severe" means is extreme, involving the severe harm previously mentioned.

This notion of combatants presenting a threat or potential threat has to be coupled with some sense of immediacy, however. As Nagel notes, "...we must distinguish combatants from non-combatants on the basis of their immediate threat or harmfulness."<sup>10</sup> While even a sleeping soldier can be a potential threat in combat (because he could wake in an instant, grab his weapon lying next to him, and start firing), one has to admit that male (and, given some national policies, female) children do not present the same sort of immediate threat. One has to admit that such children offer a potential threat in the sense that when they grow up they could become soldiers. However, what is lacking in the latter case and what is present in the former is the immediacy of the threat. The sleeping soldier presents an immediate threat or is, at least, an immediate potential threat. While male children may pose a potential threat, this threat is not in any sense immediate. Even if it could be determined (and it cannot be determined with any degree of certainty) that male children will be made soldiers upon their reaching eighteen years of age, this does not give

license to one to slaughter these children. The reason is that the potential threat is very remote.

While the notion of immediacy is elusive, one way of grasping it is to consider a long chain with the threat generated by a combatant at the end of the chain. In considering male children, there are many "links" in between the child's current physical state and the future one where he is an armed, trained soldier. He will have to grow to adulthood, have suffered no serious physical ailments (i.e., loss of a limb), the war will still have to be going on, etc. Given the somewhat intricate path of conditions that have to be satisfied for the child to ever be a combatant, he is not an immediate threat because so many antecedents have to be fulfilled. The sense of "immediate threat" is lacking because, while possible he could some day be a threat, a great deal more has to happen before he would be a threat.

While the "distance" between the child and the same child now grown as a future soldier presenting a threat is great due to the time factor involved, there is another factor at work. This other factor can be centered on by considering this child case this way: Only if the child follows a path that satisfies certain specific conditions will he wind up being a combatant. Not only does he have to progress through these various stages to be a combatant, there is nothing that guarantees he will wind up a soldier at all. In this way, it can be said the possibility that he might not turn out to be a com-

batant is also a factor, in addition to the fact that it will be some time before he could become one.

While an exhaustive treatment of all persons and the immediacy of threat is impossible here, a few cases may help further elucidate this concept: Truck drivers could be immediate threats because, if attacked, they would stop their vehicles, get their weapons out of the rifle racks contained in their trucks and begin fighting. The same is true with headquarters personnel. While the primary duties of such personnel are to plan, maintain communications, etc., upon the appearance of enemy combatants, they will grab their weapons and fight. The threat here is immediate and these persons are justly denoted as "combatants". If headquarters personnel were unarmed, they could not be justly attacked. However, the complicating factor is that one attacking a group of enemy usually cannot ascertain whether the enemy are armed or not, whether there are bullets in their rifles, etc. It is proposed, though, that, given the enemy is there operating against the other side, one can "safely" assume that the enemy does intend to fight and is equipped to do so. Also, trying to ascertain that the enemy is belligerent poses an unreasonable risk to the combatant.

Having made these distinctions of immediacy and potential threat, it can be shown that criticisms can be avoided. One such criticism is:

[T] here is no difference between attacking a wounded soldier in the hospital and attacking an unwounded soldier with a weapon against which he is defenseless.... Similarly, it might be objected that there is no coherent principle that distinguishes the wrongness of killing (generally) prisoners of war and the permissibility of killing enemy soldiers who are asleep.<sup>11</sup>

The coherent principle, it is suggested, is just the combatant-noncombatant distinction discussed. The reason a wounded enemy in a hospital cannot legitimately be attacked is because he is a noncombatant; he does not have the means or the ability to resist. He is a noncombatant because he offers no immediate threat of any kind. The reason a soldier can be attacked by means of a weapon such as aircraft or artillery (weapons "against which he is defenseless") is because he is presenting a threat to someone. (Referring to a previous example, the soldier killed by a bomb dropped by aircraft was a threat to combatants of nation A. However, the attacking combatant could also be a threat if he was attacking noncombatants of nation A as well. Therefore, the "someone" threatened could be either combatant or noncombatant.)

Some question if basic trainees are immediate threats or potential immediate threats. If not, then they would not be combatants and not subject to intentional attack. This cannot be answered "They are combatants." or "They are not combatants." If they have the means (equipment) to resist, are physically able to fight, and are pursuing the aim of defeating the enemy, then they are a threat and, hence, combatants. Whether they are motivated to defeat the enemy by love of homeland or threat

of execution does not readily affect the fact they are a threat. Also, the question concerning at what stage inducted males become combatants is a practical problem. However, it is not a conceptual one; at some stage they do become immediate threats.

Continuing to look at a variety of classes of persons mentioned in the last quote, using the immediate or immediate potential threat criteria, prisoners may not legitimately be killed because they are noncombatants. Through some means, they have given up the course of resisting and are no threat. In contrast, sleeping enemy do not show such a demonstration of having given up because, in all probability, at the sound of the first bullet being fired, they will become very real threats. That is, they are potential threats while prisoners are not. While some may object by saying prisoners are still threats because they will try to escape, while prisoners may have at least a positional duty to try to escape, this duty does not extend to continuing to threaten the enemy. This is, in fact, recognized by the Geneva Convention:

[O]ffences committed by prisoners of war with the sole intention of facilitating their escape and which do not entail any violence against life or limb,...shall occasion disciplinary punishment only.<sup>12</sup>

If they do commit acts of violence, they can be treated as any other noncombatant who commits violence, e.g. treated as common criminals. This is because they may have the duty to escape, but they have given up their status as combatants and cannot justly fight any more. The point here is that by using the

criterion of threat, the distinction between combatant-non-combatant can be made.

Arguing for this distinction between combatants-non-combatants serves two purposes: The first is to counter the moral nihilist charge that there can be no moral ascriptions in war because such an activity falls outside the jurisdiction of morality. Their claim is false because one can make defensible (valid, moral) distinctions in war, viz. the one between combatants and noncombatants. With this distinction, there is justifiable killing (killing of combatants) and killing that cannot be morally justified (killing of noncombatants). Secondly, by focusing on this distinction, the concept of what a combatant is is elucidated. Combatant is defined (in an admittedly loose way) so that the notion of a combatant is distinct from that of a noncombatant. This will be directly related to the rules of war because the first function of the rules of war is to make this distinction.

Having attempted to define combatants of one nation as those who offer a threat or potential threat of an immediate nature to (at least some) combatants or noncombatants of the opposing side, noncombatants are all those other human beings of that nation. To return to nations A and B, to nation A, all those members of B that offer an immediate threat or potential threat are combatants. All those remaining members of B are noncombatants. Similarly, nation B can divide the population of A into combatants and noncombatants. This exhausts

the populations of the two nations but the classifying must not stop here. All other persons, citizens of other nations, are noncombatants with regard to nations A and B. This is in virtue of the fact that they pose no threat to either side.

Having said that a nation's population can be exhaustively treated such that each individual member of that nation is either a combatant or a noncombatant, it must be noted that one's individual status is not permanent. While this idea has already been involved in the examples of prisoners and wounded, it needs to be made explicit. Consider X: He is a trained, armed soldier of nation A. He offers an immediate threat to soldiers of nation B. By virtue of this fact and the previous definition, he is a combatant. As a combatant, he is subject to be killed by the opposing side. (This is because the only way to nullify X's threat is to kill him, given the context of the war. If B's soldiers could nullify X's threat by another means that was less severe than combat, they should use that alternate means. It is just the case that there is no less risky means for them given the parameters of war.) In the course of attacking soldiers of nation B, X is subsequently wounded. After the battle has ended, medical personnel of nation B find X. As a combatant, X could legitimately be killed on the battlefield. Is he still eligible for death now? Should the medical person turn him over to combat personnel for a coup-de grace? The answer is no, of course, but the reasoning behind this must be examined. The intuition

that wounded enemy should not be killed is a morally correct one because once a combatant ("eligible" for death) does not mean always a combatant. The reason X is no longer justifiably killed is because X has passed from the set of combatants to the set of noncombatants. How did he do this? Very simply, he no longer offered an immediate threat to soldiers of nation B.

Like most interesting distinctions, however, this one cannot be oversimplified. This case does not prove that anyone who becomes wounded automatically becomes a noncombatant. Consider the case where, although wounded, X continues to fight on. While not physically incapacitated by his wound, he retains his weapon and continues to fire at the enemy. Because he still is a very real threat, he is still a combatant and can legitimately be killed. Also, the transition from combatant to noncombatant can be effected through means other than incapacitating wounds. An example of an alternate way is through surrender. When a soldier from one side throws down his weapon, puts his hands in the air, and walks out of his foxhole, he is demonstrating that he has given up the fight. The point here is that he has ceased to be a threat in the same way a wounded soldier could cease to be a threat.<sup>13</sup> While the surrendering soldier does so through voluntary action and the wounded soldier because he becomes a non-fatal casualty, both pass from the class of combatants to the class of non-combatants.

To reiterate the original thrust of this last argument, one is not permanently classified as a combatant or non-combatant. While this transition from one to the other is often one of rapidity, it remains a conceptual actuality even if it is difficult in practice to ascertain. Also, while the change from combatant to noncombatant was discussed, this is not the only possibility. It is just as possible to go from noncombatants status to combatant, i.e., untrained men join the army and are trained and equipped.

While putative conceptions of combatants often revolve around the wearing of uniforms, the wearing of distinctive insignia, etc., these factors are not what makes a combatant a combatant, as has been argued. While such devices would (and do) aid in the prima facie recognition of combatants, just because one wears a certain uniform does not necessarily make him a threat. As in the wounded and surrendering soldier examples, the critical factor was the fact that the immediate threat was no longer present; both could still be wearing uniforms. There still remains practical questions of how a soldier should treat others wearing uniforms of the opposing side. As has been pointed out, the wearing of a uniform cannot in itself be enough to make the wearer a combatant. (Nor is wearing a uniform a sufficient condition, given the case of guerillas or militia.)

This can be further pointed out by looking at an example posed by Lawrence Alexander: "A combatant at a camp miles

behind the lines is often less a threat than a noncombatant delivering arms and ammunition to combatants at the front."<sup>14</sup> (He is arguing against the idea of threat as determining combatants from noncombatants.) Here he may be relying on the putative notion that a combatant is one that wears a uniform. Looking at his example, however, just because one happens to be wearing mufti on the front lines does not preclude one from being a combatant. While there are those on the front lines who do not present an immediate threat to soldiers on the opposing side, e.g. medics who are evacuating the wounded, and, hence, are noncombatants, it is not clear that the person handing out ammunition and rifles at the front is not a threat. Secondly as was mentioned before, a sentry behind the lines does present a (potential) threat. He can be contrasted with an unarmed soldier who is watching a film in a movie theater on leave from the front. The former presents a threat because he has the will, means available, and is in a position to fight and kill. Therefore he is a combatant while the latter is not. (The latter may have the will but is not equipped nor in a position to threaten combatants.) While it is justified to kill the former, it is murder to kill the latter. Both are behind the lines and both are wearing uniforms. Their physical location and uniforms are not the critical factors, however. Again, this criticism is avoided by adhering to the previous "definition" of combatant. Alexander may be correct in pointing out that a soldier behind the lines may not be a combatant in

accordance with the definition being used here while a civilian on the front line may qualify as a threat. Just because common practice labels the former as "combatant" and the latter "non-combatant," so much the worse for ordinary language.

Having looked at cases where uniforms alone do not make one a combatant (e.g., prisoners of war and wounded), what justifies a combatant from nation A treating someone from nation B dressed in a uniform who he encounters on the battlefield as his enemy and a combatant? One must look to the context of the situation in order to determine how the soldier should act. Given that the battlefield situation is such as it is, the soldier is fully justified in assuming the armed enemy wearing the uniform and equipment of the opposing side does present a threat. In the situation of one strolling in the park in one's own nation on a sunny day, one can safely assume that those he meets are not presenting a threat unless they demonstrate otherwise. In a battlefield situation, the exact opposite is appropriate: Given that armed, opposing forces of an enemy are present on the battlefield, it is appropriate to assume that those out there are presenting an actual, immediate threat. Unless the persons assumed to be combatants demonstrate otherwise, such as by throwing down their arms, they can justifiably be treated as combatants. To act otherwise towards armed enemies on the battlefield would be foolhardy and to further risk, if not court, death. To unduly risk oneself is not (morally) required in the same way that in self defense one

is not required to unduly risk oneself by trying to escape rather than kill in self defense.

Before leaving this moral distinction between combatant and noncombatant, there is an issue that must be raised. This is the status of this prohibition against killing noncombatants. Is it absolute? While an interesting moral question in itself, in depth treatment of this subject cannot be given here. Suffice it to say that this prohibition is an extremely weighty moral one. So weighty in fact that it can rarely, if ever, be overridden and only in the most extreme circumstances. While some will want to know exactly how many innocent lives would justify the torturing or killing of one noncombatant, no answer will be offered here. What is presumed is that, given the status of this prohibition, it is at least "almost" absolute and will be treated as absolute in the remainder of this effort. While this is a weakness, it is one required to proceed.

Assuming that one will grant this distinction between combatants and noncombatants as discussed above, this is the very distinction the first function of the laws of war is supposed to make. It also goes to show that the moral nihilists' claim is false. Moral distinctions in war are possible and, with this distinction, so are moral judgments. Having looked at this first function of the war convention, what about the second?

## The Second Function of the Rules of War

The second function of the rules of war as they stand is to specify what means can be used between two groups of combatants. This can only follow once the distinction between combatants-noncombatants has been made and where it is acknowledged that noncombatants cannot be legitimately subject to attack. While it has been argued that the first function of the war convention is one that makes a valid moral distinction, whether this second function involves a similar valid moral distinction must be examined.

To begin with, it must be clear what the rules of war do in this second function. As mentioned above, they limit the type of means belligerents may employ against other belligerents. (There is no need to specify means allowable between belligerents and nonbelligerents because none are legitimate.) An example would be the Paragraph 34 of The Law of Land Warfare:

Usage has...established the illegality of the use of lances with barbed heads, irregular shaped bullets, and projectiles filled with glass, the use of any substance on bullets that would tend unnecessarily to inflame the wound by them, and the scoring of the surface or the filing off of the ends of the hard cases of the bullets.<sup>15</sup>

The use of these types of weapons is prohibited and it is important to note that the reason these weapons are prohibited is based on the fact that they cause "unnecessary suffering."

While it is readily apparent that, due to its very nature,

war provides the framework for all kinds of suffering, there is a plausible distinction to be made between necessary and unnecessary suffering. Soldiers who are killed or wounded in any contact between combatants do suffer. This suffering can be further minimized, however, even given the license the two groups of combatants have to kill one another as long as the other remains a combatant. The unnecessary suffering notion comes in when one considers suffering that goes beyond the purpose of nullifying the enemy threat.

To return again to the self defense example, as has been pointed out earlier, violent means was allowable given no other less severe means was available. This principle is applicable to war. Given that the context of war and the situation on the battlefield are such that violent means are (usually) the least severe one can employ against combatants to nullify their threat, any weapon or weapon use that causes suffering beyond that required for nullifying the threat causes excess suffering. (This excess would be the suffering "over and above" that required to nullify the enemy threat.) While these quantities of suffering are problematic, the concept is clear even if the quantification process is not.

The relationship between necessary suffering and unnecessary suffering can be defined by referring to military purpose. As has been mentioned previously, given that a combatant on the battlefield is confronted with an armed, trained opponent whom he has every reason to believe is intent on killing him, the

combatant is justified in acting to nullify the threat. Given the means at his disposal and the circumstances, it is likely that the "least severe means" are those violent means available to combatants. In this context of combat between combatants, suffering will be unavoidable but one can distinguish suffering that accomplishes its military purpose of nullifying the enemy combatant's threat and suffering that goes beyond doing this. The military purpose, then, is nullifying the enemy's threat.

To return to the sentry example, it was just the case that, in order to be justified, knifing him had to be the least severe method of nullifying his (potential) threat without undue risk to the attackers. If a tranquilizer gun could have done the same thing, i.e. nullified his threat, and the commandos had such a weapon, to kill him would have been wrong. It would have caused suffering beyond that necessary to eliminate the guard's threat. Although the commandos could justifiably attack the guard because he was a combatant, the means they used could not cause suffering in excess of the military purpose of nullifying his threat.

However, some "...deny...that the laws of war that deal with weapons can be plausibly viewed as reflecting distinctions of genuine moral significance."<sup>16</sup> Their argument seems to be like this: One often recoils from descriptions of the horrible casualties caused by use of poison gases in World War I. Many who were not killed were permanently maimed. Specifically,

large numbers of gas casualties that lived through the experience were permanently blinded. While a terrible affliction, what exactly is the difference between a soldier being blinded by poison gas and a soldier being blinded by shrapnel from an exploding artillery projectile? Both are blinded by modern weapons. The only difference here seems to be that poison gas is outlawed by various conventions (it has been declared an "illegal weapon") while artillery rounds of the high explosive variety are considered "legal." What is denied is that there is any real moral distinctions between the employments of these two weapons.

It seems that the point is that the result in both cases are the same. Both weapons blind combatants. If this is so, what is it about poison gas that makes it so much worse than exploding artillery projectiles? While it is the idea of suffering that will be used and the fact that poison gas causes more suffering than shrapnel does, the critics could go even farther. This can be illustrated by another example: The current rules of war state that copper jacketed bullets are legal (do not cause unnecessary suffering) while hollow tipped bullets (which cause gaping wounds) are illegal. Given the infinitely large possibility of hypothetical situations, it is possible to consider that there could be a case such that one shot with a copper jacketed bullet (with its relatively "clean" entry and exit) would cause a soldier to bleed to death in a matter of minutes. Contrast this with the soldier who is

wounded by a hollow point bullet. Because of his gaping wound, he bleeds to death much faster (and suffers less) than the soldier shot in the same place with a "legal" bullet. On these grounds, it is proposed that it may be more humane to use the "illegal" bullets.

This is the force of these arguments: The first case sought to show that the suffering caused by one illegal weapon (poison gas) was the same as that caused by a legal weapon (artillery fire). The second sought to show that an illegal weapon could, in fact, cause less suffering than a legal one. The point to notice here is that, while specific cases can be compared such that an illegal weapon causes equal or even less suffering than legal ones, in general, use of the illegal weapons does cause more suffering. To use the poison gas - shrapnel contrast, shrapnel incapacitates combatants without necessarily burning out their lungs or blinding them permanently. While some combatants may be blinded by shrapnel, far fewer are blinded than by use of poison gas. In the second case, too, it is thought that copper jacketed bullets incapacitate by making relatively "clean" wounds that prove less fatal and less maiming than hollow tipped ones. Both legal weapons cause less suffering in relation to the illegal ones, providing the least severe means available to defeat the opposing combatants.

While the truth of these claims is based on empirical results, the decision to ban certain weapons and to prohibit

using certain weapons in certain ways is based on a moral distinction. Given a variety of means available, combatants should use those means which cause their opposing combatants the least suffering. If combatants of nation A can nullify the threat caused by the combatants of nation B only through combat, this does not mean they can use any means whatsoever. They are still morally bound to use the least painful means that will accomplish the military purpose. If A's combatants have the capability to either kill all B's combatants with nerve gas or wound them with bullets (some will die and some will recover from wounds), the course of least suffering is best, given both accomplish the same end.

In addition to some weapons or certain uses of such weapons being banned because, relative to other weapons, they cause unnecessary suffering concerning strictly combatants, some weapons or weapon uses are banned because they fail to acknowledge the combatant-noncombatant distinction. Consider the acknowledged prohibition on the use of poison. Under this general prohibition, it is forbidden to poison wells. Why? Given that one could ascertain that a certain well would only be used by combatants, it may be proposed that poisoning wells is legitimate in combat between combatants. It is doubtful this is the case given the previous discussion but, even if poisoning was "legal" between combatants, the reason this means of war would still be ruled out is the very fact that poisoning wells cannot be oriented specifically

towards enemy combatants. Given the human need for water and the fluid nature of battle, the well poisoned yesterday could be behind the lines today and noncombatants might use it. Not only that, but this well was probably dug in the first place to supply water to at least some of the local inhabitants. The point here is that there is no way for this weapon to be employed so that noncombatants casualties can be avoided. Once the well is poisoned, there is no discrimination between the victims of the poison. Both combatants and non-combatants can be killed by it.

This example may be thought to be unfair in that it presents a weapon use that will render unusable a valuable human resource, very possibly for years after the cessation of hostilities, polluting the water table, etc. However, if one looks at why this specific weapon is thought to be wrong, it is because it affects noncombatants as well as combatants. Consider a more conventional weapon: In past military conflicts, nations employed strategic bombing against other nations.<sup>19</sup> During World War II, the Allied Nations bombed German cities on a daily basis. When it was known that the city below had a full civilian population (it had not been evacuated), was it morally legitimate to bomb them? While there were at least some raids whose planned target was the civilian population and not munitions factories, tank plants, etc. (Hamburg was one such case<sup>20</sup>), assuming that most raids attacked cities containing both combatants and noncombatants, were these raids

immoral? The "battle" consisted of combatants intentionally dropping bombs on noncombatants and combatants. The fact that the bombers were under attack from German aircraft does not matter. Unlike the previously mentioned situation where a combatant who poses a viable threat to enemy soldiers may legitimately be attacked by the enemy through use of his aircraft, this World War II bombing case does not fit the same mold. The civilians in the city under attack presented no threat to any Allied combatants in any direct way. Because they (the civilian population) did not fall into the class of combatants, they cannot intentionally be attacked. If then current Allied bombing policy permitted such actions to occur, so much the worse for the Allies.

There are several complex issues here that will be only briefly mentioned. First, some will argue that the non-combatant deaths were foreseen but not intended, using the principle of double effect. This is rejected as false. Both combatants and noncombatants were intentionally killed.<sup>21</sup> Given that bombing of cities involves this, bombing as a method of war is morally prohibited because it fails to make the distinction between combatants and noncombatants, killing the latter as well as the former.<sup>22</sup> Secondly, the argument that civilian deaths can be balanced in terms of what purpose their deaths serve is also rejected. Given that noncombatants present no threat, they can not be subject to intentional attack by combatants, even if doing so would serve a military purpose. Even

if the civilians do offer moral support, work in factories, etc., they are not a threat. They are not a threat because they do not have the equipment or training of combatants and are not in a position to attack anyone from the opposing side. Since the civilians are no immediate threat or immediate potential threat, they are not combatants and cannot, under any circumstances, be intentionally attacked. Again, the only point being argued here is that, in addition to weapons being banned because they cause unnecessary suffering to combatants, some are banned because their use or certain specific use violates the absolute prohibition about intentionally attacking noncombatants. These weapons are not banned based the moral reason that they cause too much suffering to combatants. Rather, these weapons or certain uses of weapons are prohibited based on the first function of the laws of war, e.g. prohibiting activities which cause the intentional death of combatants. This prohibition stems from the (moral) distinction between combatants-noncombatants.

To return to the second function of the rules of war, which is to prohibit or restrict certain means in combat between combatants, there is a moral distinction at work here, too. Rather than it being the absolute one pertaining to the intentional attacking of noncombatants, however, it is one based on another moral distinction where this distinction is between necessary and unnecessary suffering of combatants.

It has been argued that both the first and second functions

of the rules of war are based on moral distinctions. The set of rules that specify who can be legitimately attacked revolves around the moral distinction between combatant and noncombatant. This is the first function. The second function is fulfilled by those rules which limit or prohibit the use of certain weapons in combat between combatants. These rules, too, involve a moral distinction in that the allowable weapons and uses of weapons do not cause unnecessary suffering.

#### The Historic Versus Ideal Rules of War

Having argued that the war convention should follow the two moral distinctions, how does this somewhat ideal version compare with the war convention that has emerged historically? It must be admitted that the actual war convention is an imperfect instrument. Walzer captures this idea when he states:

The war convention as we know it today has been expounded, debated, criticized, and revised over a period of many centuries. Yet it remains one of the more imperfect human artifacts: recognizably something that men have made, but not something that they have made...well.<sup>23</sup>

This is not to say that the war convention does not try to serve an actual purpose. It is just the case that it may not always accomplish what it should. Consider the historic example previously mentioned: During World War II, it was Allied policy to bomb German cities. This was the result of the Casablanca conference, where a combined staff of high ranking United States and British military personnel decided

to adopt the policy of strategic bombing which was designed, among other things, to destroy important German cities. (This was done with the purpose of undermining the morale of the German people and disrupting their economic/industrial system.) It was clear that the objects of at least some bombing attacks were not military targets or groups of combatants. The targets were the built-up areas of cities and the people that lived there. As history has recorded, this bomber offensive was carried out and hundreds of thousands of German civilians died.<sup>24</sup> After the German surrender, no Allied officials were charged with war crimes because it was thought "...the bombing of cities with almost any kind of bomb imaginable is perfectly proper because bombing is an important instrument of the war."<sup>25</sup>

One way of interpreting this result was that it was considered within the bounds of the rules of war to use strategic bombing as a means of forcing one's enemy to capitulate. The idea that it was "perfectly proper" seems to reinforce the notion that nothing being done was considered wrong. So far, however, this only goes to show what certain persons at this time in history believed. Just because they may have genuinely thought obliteration bombing was not a violation of the war convention does not mean it was morally the correct position. Further, it was not a proper means of waging war because it did not accord with the ideal war convention because it violated the combatant-noncombatant distinction.

Given that such bombing was held to be a legitimate means

of waging war, exactly how this view came about seems a project for anthropologists. What is important to note is that just because it was held to be legitimate does not, in fact, make it so. Using the previously mentioned combatant-noncombatant distinction, Allied policy can be examined. It has been argued that noncombatants cannot be subject to intentional attack; only combatants can be so attacked. The fact that there probably were some military personnel in the attacked cities at the time of the bombing raids aside, an intentional aim of this policy was to attack noncombatants. Since to attack non-combatants when the attacking party is aware they are non-combatants, viz. they present no real threat, is morally wrong, this policy was immoral. It remains immoral even if the practice was accepted and used by both sides.

Returning to the issue, it is clear that in some cases the actual war convention in effect at the time may deviate from the rules of war that would be generated following the guidelines previously mentioned. This is taken to be the case in the Allied bombing policy example. Even if the bombing of cities was an accepted practice, it still violated the moral distinction between combatant and noncombatant. (It violated this distinction because it intentionally attacked non-combatants.) This fact has been recognized by others: Wasserstrom states, "The most serious problem, I think, is that the distinction between combatants and noncombatants is not respected by the [actual] laws of war...".<sup>26</sup> Again, the point here

is to note how the actual rules may not coincide with those rules generated by observing the two moral distinctions mentioned earlier. This is brought out because, while certain actual laws of war may not follow either of these moral distinction, that is not an argument against the rules of war generated by following these two distinctions. Having brought out this distinction between the "ideal" rules of war and the historic rules of war, further discussion will focus on the former unless specified otherwise.

## Notes

<sup>1</sup> Michael Walzer, Just and Unjust Wars (New York: Basic Books, Inc., 1977), p. 44; Thomas Nagel, "War and Massacre," in War and Moral Responsibility: A Philosophy and Public Affairs Reader, eds. Marshall Cohen, Thomas Nagel, and Thomas Scanlon (Princeton: Princeton University Press, 1974), p. 18.

<sup>2</sup> Richard A. Wasserstrom, "The Laws of War," in The Monist, 56, No. 1 (January 1972), 2.

<sup>3</sup> Michael Walzer, "Political Action: The Problem of Dirty Hands," in War and Responsibility: A Philosophy and Public Affairs Reader, eds. Marshall Cohen, Thomas Nagel, and Thomas Scanlon (Princeton: Princeton University Press, 1974), p. 81.

<sup>4</sup> Richard A. Wasserstrom, "On the Morality of War," in War and Morality, ed. Richard A. Wasserstrom (Belmont, California: Wadsworth Publishing Company, 1970), p. 86. Underlined portion of quote is italicized in original text.

<sup>5</sup> Jan Narveson "Pacifism: A Philosophical Analysis," in War and Morality, ed. Richard A. Wasserstrom (Belmont, California: Wadsworth Publishing Company, 1970), pp. 63-77. Narveson argues against one type of philosophical position that holds all killing is wrong.

<sup>6</sup> Exodus, 20: 13.

<sup>7</sup> Robert K. Fullinwider, "War and Innocence," Philosophy and Public Affairs, 5, No. 1 (Fall 1975), 94.

<sup>8</sup> The question of how the combatants arrived on the battlefield relates to responsibility will be discussed in Chapter III.

<sup>9</sup> Nagel, p. 20.

<sup>10</sup> Nagel, p. 20.

<sup>11</sup> Wasserstrom, "The Laws of War," p. 10.

12 Department of the Army Field Manual, The Law of Land Warfare, FM 27-10 (Washington, D.C.: Government Printing Office, 1956), p. 65-66.

13 This may be misleading in appearing too simple. It is always a possibility this soldier is a fanatic with a hand grenade hidden in his clothes who, knowing he is out of rifle ammunition, uses surrender as a play to get within hand grenade range.

14 Lawrence Alexander, "Self Defense and the Killing of Noncombatants: A Reply to Fullinwider," Philosophy and Public Affairs, 5, No. 4 (Summer 1976), 412.

15 The Law of Land Warfare, p. 18.

16 Wasserstrom, "The Laws of War," p. 11.

17 Wasserstrom argues this way. "The Laws of War," p. 11.

18 The Law of Land Warfare, p. 18.

19 John C. Ford, "The Morality of Obliteration Bombing," in War and Morality, ed. Richard A. Wasserstrom (Belmont, California: Wadsworth Publishing Co., 1970), pp. 15-41.

20 Vera Brittain, "Massacre by Bombing," Fellowship, X (March 1944), p. 57. This reference obtained from Ford, p. 30. See also Walzer, Just and Unjust Wars, pp. 30-31.

21 Anscombe's argument is accepted. Elizabeth Anscombe, "War and Murder," in War and Morality, ed. Richard Wasserstrom (Belmont, California, 1970), pp. 50-51.

22 Michael Walzer, "Moral Judgment in Time of War," in War and Morality, ed. Richard A. Wasserstrom (Belmont, California: Wadsworth Publishing Co., 1970), p. 58.

23 Walzer, Just and Unjust Wars, p. 45.

24 Walzer, pp. 255-256; John C. Ford, "The Morality of Obliteration Bombing," in War and Morality, ed. Richard A. Wasserstrom (Belmont, California: Wadsworth Publishing Company, Inc., 1970), p. 31.

25 Richard Wasserstrom, "The Laws of War," in The Monist, 56, No. 1 (January 1972), 6.

26 Wasserstrom, "The Laws of War," p. 9.

### Chapter III

#### Moral Violations in War

Before centering on how responsible an individual can be held to be in war, it must be recognized that there are those who try to make the move that no individual is responsible in war. Rather, it is some group that bears collective responsibility. While the issue of collective responsibility will not be treated here, the argument that the individual is absolved of any responsibility because he is only a part of the collective will be considered.<sup>1</sup>

In his trial for war crimes, Lieutenant Calley claimed that the Army was a "Frankenstein monster" and, as such, could not be blamed for its action.<sup>2</sup> His analogy went further in that he could not be blamed, either, since he was just part of the "monster." Put a little differently, Calley was claiming he was not individually responsible because he was a cog in the Army machine. By closely examining his analogy, it will become clear that, while Frankenstein's monster may not have been responsible for his (the monster's) actions, Calley was responsible for his participation in My Lai. The analogy is supposed to go like this: Doctor Frankenstein created the monster and was therefore responsible for its actions when it ran amuck. Similarly, American society created the Army and it is this society (collectively) who should be held responsible

when its creation commits atrocities. As French correctly points out, the analogy does not work for one important reason. This reason is that the Army is made up of individuals who can be held responsible for their actions. Unlike the monster, who could not think for itself, people are thinking agents and not mindless machines.<sup>3</sup> As Walzer put this: "Soldiers can never be transformed into mere instruments of war." and "[T]hey do not stand to the army as their weapons do to them"<sup>4</sup>

The issue of collective responsibility aside, the individual soldier is taken to be responsible for his actions because he is an agent. He decides what he will do and can be held responsible for what he carries out. To return to the terms previously discussed, a soldier has capacity-responsibility in the same way any normal human being has capacity-responsibility. It is assumed that a soldier is able to understand, reason, and control his conduct in exactly the same way that a person who is not a combatant has these abilities. Of course, just as one outside the context of war may lack or have his capacity-responsibility affected, so, too, a combatant's capacity-responsibility may be affected. As has been suggested before, one's being held fully liable-responsible will depend on one's being fully capacity-responsible. Conversely, if one's capacity-responsibility is diminished, his liability-responsibility will also be diminished as this capacity directly relates to the agent's responsibility.

Having mentioned liability-responsibility, it was proposed earlier that there were two types, moral and legal. In regards to the former, one is morally liable-responsible when one is subject to moral blame (or praise) for one's action.<sup>5</sup> With this in mind, it must be made clear just what constitutes a moral violation in war such that one is morally blameworthy and referring to the ideal war convention is what gives one the basis for making ascriptions of (moral) blame.

The ideal rules of war, it was argued, perform two functions: The first was to make the moral distinction between combatants and noncombatants. The second function was to eliminate unnecessary suffering of combatants which reduced "the suffering of soldiers."<sup>6</sup> Given this ideal war convention then, there are two ways soldiers (combatants) can violate it: Combatants may violate rules that distinguish combatants from noncombatants, viz. they may intentionally attack noncombatants, and soldiers may break the second type of rules by using forbidden means against other combatants. (Note that if they use forbidden means against noncombatants, this puts them into the first category mentioned, the category of intentionally attacking noncombatants.) The question now is whether these violations of the ideal war convention are moral violations.

Violations of the first type are moral violations because the agent's actions breach a moral prohibition. The prohibition involved is the one concerning noncombatants. Because they do

not present any threat, noncombatants cannot ever be legitimately attacked. They are not morally eligible for attack in the way combatants are because of this moral distinction. If they are attacked, the person who intentionally attacks them has committed a moral violation and is morally liable-responsible. Similarly, violations of the second type of the rules of war are also moral violations. Based on the prohibitions concerning different types of weapons, if one uses a weapon that causes unnecessary suffering, he has committed a moral violation.

Given that these moral violations result because actual moral distinctions are being violated, what about the argument "from contract"? This is the idea that one could be held morally liable for failing to follow the rules of war based on the way one is tied to these rules in the first place. To refer to the example previously used, given that X is not something one morally should do in itself, if A promises to do X, then A has a moral duty to do X. Conversely, he may be subject to moral liability-responsibility if he fails to do X. To apply this promise keeping model to the ideal rules of war will be difficult, however. One problem is that the individual combatant at the front line expected to observe such rules did not agree to them at all. He may have been inducted into the army so that he finds himself expected to follow these rules concerning which he had no voice of approval or disapproval. Even if he did volunteer for his

position as combatant, he was probably unaware of the exact content of the rules. If he, the combatant, did not agree to the rules, is he obliged to follow them?

The answer is that he is and the reason is because he is presented with moral distinctions. It is not the case that the rules of war are "convention-dependent."<sup>7</sup> The combatant is not tied to the rules of war by agreeing to follow them, although he may have done so and so further morally obligated himself to follow them. This case is unlike the promise keeping example because the promised action in itself was not taken to be morally binding; it was only binding when one promised to do it. The rules of war are taken to be morally binding in that they observe moral distinctions all are obligated to observe, regardless whether or not the persons agree to follow them.

#### What is and What Should Be

One thing that must be recognized is that moral violation has been framed with regard to the "ideal" rules of war. As has been mentioned before, the historic war convention is an imperfect instrument and often does not coincide exactly with the "ideal" war convention. What ramifications this has for individual responsibility must be briefly explored.

The possible consequences of the actual war convention differing from what it should be can be sketched using a hypothetical situation: Prior to any conflict, nations A,B,

C, D, and E hold a conference and generate a convention along the lines of the Hague and Geneva conventions. However, contrary to previous conventions, all nations agree that prisoners of war must be shot upon capture. (Such a position is held because each nation feels any soldier belonging to it that got himself captured is not worth getting back anyway.) At a later date, nations A and B go to war and nation A captures soldiers of nation B. X, the individual in charge of the prisoners, knows the rules but cannot bring himself to execute the prisoners; he violates the agreed upon war convention by not following the specified rules of war. Given the specified rule of war, X could be tried as a war criminal. After all, it can be pointed out, he did violate the rules of war.

To put this in terms of the different senses of responsibility previously discussed, X can be held legally liable-responsible because he violated a rule of war of the existing (historic) war convention. However, he cannot be held morally liable-responsible because what he did respected the moral distinction between combatants and noncombatants. In this way, some may consider him in a dilemma: If he executes the prisoners, he is morally liable-responsible for his actions. If he does not execute them, he could be held legally liable-responsible. This dilemma is a conflict between doing what is morally right versus doing what one will to avoid (possible) punishment. While it raises many interesting questions in its own right, they will not be considered here. The point

to recognize is the potential problems generated by the lack of coincidence between what is the present or past war convention and what should be the war convention. Having acknowledged this practical problem, further discussion will focus on violations of the rules of war as these rules should be rather than what they are.

### Jus ad Bellum and Jus in Bello

Having established what are moral violations within war, there is an area of dispute concerning how individual responsibility can be affected given the status of the war as just or unjust. To use the jus ad bellum (war itself as just or unjust) - jus in bello (war being justly or unjustly fought) distinction, what is the relation between the two?<sup>8</sup> Nozick claims that:

Soldiers who know their country is waging an aggressive war and who are manning antiaircraft guns in defense of a military emplacement may not in self defense fire upon the planes of the attacking nation..., even though the planes are over their heads and are about to bomb them.<sup>9</sup>

In this way, combatants fighting on the unjust side are wrong in all aggressive actions even if they fight in accordance with the ideal rules of war (observing the combatant-noncombatant distinction and prohibitions against using weapons that cause unnecessary suffering).

In addition to this view there is the further one that holds the party in war who has been unjustly aggressed against may use any means whatsoever to defeat the aggressor. Some may interpret Locke this way when he states, "[T] he state of

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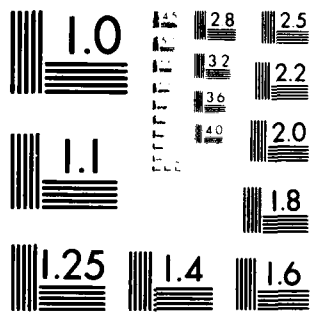
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war once begun continues with a right to the innocent party to destroy the other whenever he can...."<sup>10</sup> The point here is that the soldiers of the nation unjustly attacked can do no wrong in their combat against their enemy; for them there can be, in principle, no moral violation (because aggressors forfeit all moral rights).

While the issue of jus ad bellum is one of philosophical interest in its own right, the relation between this and individual responsibility in jus in bello must at least be briefly treated. With regards to the position that soldiers of an unjust aggressor are wrong in all they do, even obeying the ideal rules of war, Nozick can be questioned when he states:

It is a soldier's responsibility to determine if his side is just; if he finds the issue tangled, unclear, or confusing, he may not shift the responsibility to his leaders, who will certainly tell him their cause is just.<sup>11</sup>

When one considers the propaganda that goes on such that news is selectively filtered if not twisted or distorted, it is hard to determine how the soldier is to acquire this solid epistemic foundation on which to base his decision to participate in the war or not. Nozick acknowledges this difficulty by noting the soldier cannot rely on his superiors to provide an accurate data base because they "...will certainly tell him their cause is just." His correct point here is that the soldier cannot just leave it up to his superiors to decide what to do. While the soldier's only source of information may not be his leaders (in that he could receive letters from home, newspapers, etc.)

he may not be able to rely on these either, as they may be censored or even subject to (and, hence, incorporating) the same deceptive propaganda he would have received if he just relied on his leaders. If these sources of information are exhaustive for the soldier (he certainly cannot ask the other side), he cannot make a correct decision because he cannot be sure he has the right information.

The point here is that, given the state of the common soldier, it is most likely he is not in the position to make judgments concerning the just or unjust nature of the war he is participating in. Even if this is the case, however, it is proposed he is responsible for his conduct within the war. Even if he is not responsible for how he got there, he is responsible (in the moral liable-responsible sense) for how he acts once there. Even if he is involved in an unjust war, he is at least responsible for moral violations of the type previously described.

Before leaving the case of a soldier on the unjust side in war, even if he knows his side is unjust he still may not be fully responsible for being in the war. He may have been coerced into serving. Threats to his family or threats of his own death may have been used. The only point to note here is that, having sketched a case where the soldier was not responsible for participating in an unjust war because of ignorance, there may be other factors mitigating responsibility in that participation was coerced. Even if one finds oneself in such a situation,

one still must follow the rules of war.

In looking at the case of a soldier on the just side who can do no wrong, the problem seems to be one of determining if his cause is just in that he may have a difficult time determining if his side is just based on the factors previously mentioned. Even if he has determined his side is just, however, he cannot claim that he does not have to follow the moral distinctions outlined by the rules of war. This is because the noncombatants of the opposing nation still do not present any threat even if their side is unjust. Therefore, they cannot justifiably be attacked and the distinction involved in the first function of the ideal rules of war remains unaffected.

With regard to the second function of the ideal rules of war, even if the combatants of the opposing side are unjust aggressors, it does not take any more suffering to overcome them than if they were just combatants. Since one is required to nullify their threat using the least severe means to minimize the suffering of combatants, one should use the means causing the least suffering yet accomplishing the military purpose. This minimum suffering requirement is not affected by the combatants participating in a just or unjust war; unnecessary suffering is unnecessary independent of jus ad bellum.

In treating the relation of jus ad bellum to jus in bello, then, it is held that it only may be the case that "[S]oldiers... are not responsible for the overall justice of the wars they fight...".<sup>12</sup> While some may know they are unjust aggressors or

just combatants against oppression and others may be unable to determine this, they all are at least responsible for their action within war or jus in bello. Soldiers (combatants) are responsible for all their individual actions because, while they may not have had much to do with getting into the combat situation, they are at the very least morally liable-responsible for their actions in the war.

### Military Necessity

Given that soldiers can (at least) be held morally liable-responsible for their actions within war and moral violations occur when the ideal war convention is violated as has been previously discussed, is it the case that if a soldier is causally responsible for a moral violation, then he is automatically liable-responsible? Using Nozickean terminology, given that a soldier commits a moral violation in war, is he always morally liable such that his  $r = 1$ ? One defense that is commonly offered to excuse the individual soldier from liability-responsibility is that of "military necessity."

This claim of military necessity pertains to the war convention and is as follows: "[Military necessity] permit[s] almost all moral claims to be overridden by considerations of military utility."<sup>13</sup> This doctrine would allow that, given specific circumstances, the combatant-noncombatant distinction would not set absolute moral prohibitions. In an example used by Teleford Taylor, a small unit that takes prisoners far be-

hind enemy lines does not have the means to secure them nor means to evacuate them as would normally be the case. Based on their unusual circumstances, the appeal to military necessity would justify the prisoners being killed.<sup>14</sup> Cohen correctly points out that (the lack of) historic examples in the past that no one has been brought to trial for such action does not mean the action was not wrong morally.<sup>15</sup> Further, it seems this claim of military necessity involves utilitarian calculations such that the party's interest or mission "outweighs" the value of following the usual moral distinctions (where this moral distinction in war is just the one between combatants and noncombatants). As has been argued before, this type of overriding is extremely rare (if it ever occurs) given the weighty moral distinction involved. Returning to this distinction, combatants are subject to the possibility of being killed because they are combatants. When they pass from this class to the class of noncombatants, they are no longer subject to be intentionally killed by combatants. To return to Taylor's case, given that the prisoners are non-combatants, there are no grounds for legitimately killing them. The mere presence of the prisoners does not directly threaten the captors, even if their presence does hinder and inconvenience their captors. Even if the prisoners did somehow threaten the military mission of the group and military necessity was invoked to "dispose" of them, there is another consideration involved.

This consideration has been focused on previously and is the idea that the least severe means should be used to nullify combatant threat. Applying a variant of this idea (a variant because noncombatants are involved), the least severe method should be used here also. If the patrol cannot take them along, this does not mean the only option is to kill the prisoners. Leaving them bound and gagged would enable the patrol to get away before the former prisoners were discovered. If the patrol was in a remote enough area, simply disarming the prisoners and releasing them may suffice. While there could be circumstances where killing the prisoners was the only means, this is not always the case. Further, this plea of "military necessity" is only allowed given the combatant-noncombatant distinction is not taken as absolute.

To return to the possible excusing nature of the plea of military necessity, this cannot be used by individuals to excuse them or to reduce their moral liability-responsibility at all if the prohibition against killing noncombatants is absolute. Although historically this may have been used to escape legal liability-responsibility, too often military necessity very rarely (if at all) provides moral grounds for overriding the moral distinction between combatants and non-combatants.

#### Coercion and Responsibility

Another defense which is offered to excuse an individual

from moral liability-responsibility is the plea of "superior orders". This is the plea that X did not choose to shoot the prisoner; X was ordered by Sergeant Jones to shoot him (so X did). This must be examined more closely because, unlike the plea of military necessity, the plea of superior orders may do some work in reducing an individuals liability-responsibility.

The most obvious move made by an appeal to superior orders is like that plea previously mentioned in Lt. Calley's case to excuse him from individual responsibility. This is the idea that one was simply "following orders" in that, in the army, when told to do X, one simply does X. This is too simple, however, for it disregards an important fact that a man is more than a robot who just follows instructions. The previous conclusion still stands:

"[T]he obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine but as a person."<sup>16</sup>

One may grant that a soldier is not an automaton that must obey orders yet can argue that it is (part of) the role-responsibility of a soldier to do so. This can be countered by referring back to Simmons' analysis of positional duties because persons who take this line are arguing that soldiers are morally obliged to obey orders based on their position as soldiers. It must be remembered that moral duties and obligations are what is being discussed and the conclusion was reached that positional duties cannot, in themselves, engender moral ones. When it

appears that positional duties do engender moral ones, it is the case that either there was a moral duty to do what there also was a positional duty to do or it was the way in which the position was entered into that created the moral duty.<sup>17</sup>

In the case of a soldier receiving the order, while as a soldier he may be expected to obey orders, it is certainly clear that there is no "natural duty" that coincides with this positional duty to obey orders in the same way the medic had both a positional and moral duty to care for the wounded. There may be more of a case for the second type of situation, though, where how one got to be in the position bears on it being a moral duty. Consider the optimum case: B volunteers to become a soldier (and, hence, combatant). Upon entering the army, he takes an oath to obey all orders he is given. Some time later, B is ordered to shoot a prisoner of war. Can he claim that he has a moral duty or obligation to execute the noncombatant? While one wants to say he has no moral duty, this intuitive response must be reinforced.

It can be reinforced by referring to a often used example concerning the institution of promise-keeping. If X promises to meet a friend at the tennis court at five o'clock sharp for a game of tennis, it is true X has a moral obligation to keep his promise. However, if enroute to the tennis court X sees a person seriously injured on the side of the road and there is no one around to render aid, X ought to help him even

if it means breaking his promise. One way to explain why helping the injured person was the (morally) correct thing to do is as follows: While X had a prima facie obligation to meet his friend, this obligation only existed given the absence of any conflicting obligation of a more serious nature. While it would have been wrong to have frivolously failed to keep the promise, it was not wrong to break it to render assistance to one in distress. In fact, to break the promise in the latter situation was the right thing to do.

Returning to the best case for the soldier having a moral duty to obey orders (based on how he got into his position), while he may have a moral duty to obey orders (and it is further advanced that such circumstances rarely obtain), it is only a prima facie moral duty. Such a duty can be overridden by other moral considerations. Even though the prima facie moral obligation to obey orders exists, this is overridden (not nullified) by the moral prohibition against killing noncombatants. This is just like the promise keeping example. While one normally would be morally bound to obey orders in situations where there were no other, conflicting moral duties, this is not the case here. There is a conflicting moral duty and that is the one generated by the combatant-noncombatant distinction.

Having examined the two ways in which positional duties can be tied to moral ones, it is proposed that it cannot be said that, by virtue of the fact one is a soldier, one is

morally bound to obey all orders.

Since it has been denied most soldiers have a moral duty to obey orders and, even if they do, it can be overridden by another moral duty, it may be asked how soldiers come to have this moral duty to observe the combatant-noncombatant distinction. Using Simmons' two exhaustive cases of how positional duties seem to engender moral ones again, it is proposed that not to attack noncombatants (or those posing no immediate, direct threat to oneself) is a moral duty that all have. Walzer talks this way when he states that soldiers have "outward responsibilities" which extend to those with whom he (the soldier) comes into contact. By virtue of the fact that he and they are moral agents, he has moral duties to them.<sup>18</sup> Returning to Simmons' cases then, the soldier has a positional duty to do exactly what he has a moral duty to do anyway, viz. the duty not to kill those who present no real threat to him. It is just the case the positional duty neatly coincides with this moral one.

Recognizing that the individual ordered to do X is not an automation and that one cannot claim it is a role-responsibility to obey all orders, there are circumstances surrounding the superior orders that could serve to mitigate or exculpate one from moral liability-responsibility. These circumstances deal with ignorance of fact and coercion. In reference to the former, consider the following hypothetical case: A is the head of a gun crew on a howitzer. By the nature of field artillery operations, the gun crews receive limited information

from the fire direction center (FDC). The FDC passes the word to the gun crews to set a certain elevation and deflection on the gun and to cut a certain charge for the projectile. Then the chief of the gun crew jerks the lanyard, firing the gun. No mention of what the target is ever need reach the gun crew and yet their round may land on noncombatants miles away. While A can be described as intentionally firing the howitzer, he cannot be described as intentionally killing noncombatants. In this way, due to the nature of modern war, A could follow orders and kill noncombatants yet, due to ignorance of fact, not be morally liable-responsible for this moral violation.

There is another aspect of ignorance that must be mentioned. Ignorance of fact does not always serve to excuse. If A's ignorance was negligent in that he should have known what his target was but did not bother to find out, he can be held liable. He is liable (morally) because, even if he was ignorant of the facts, he should have known them. Further, the reason he did not know the facts can be traced to him. If the ignorance was not negligent, though, it actually is an excuse.

Further, it must be recognized that a soldier is not given the opportunity to satisfy his curiosity so that he is sure that what he's about to do will not be a moral violation. To return to the chief of the gun crew case, A could not have queried the FDC as to what the target was and, even if he did get an answer, it may not have been the truth. While ignorance of fact may excuse the individual from liability-responsibility,

it must be carefully discerned when this is simply offered as an excuse.

There may be a further connection between this ignorance of fact and negligence. This is when the act rather than the ignorance was negligent. To continue with the artillery example, if A knows that the impact point of his fired rounds is the center of a city that has not been evacuated and is not a military position, he can assert that he does not "know" (for sure) that his round will kill anybody (it may be a dud, detonate in a vacant lot, etc.). In the same way one was prone to consider the unsafe target shooter as negligent who did not realize shooting at a tin can in his backyard behind which was a school playground was negligent, so too A is negligent.<sup>17</sup> Given the nature of artillery fire, it is dangerous to noncombatants to shell their town and if he intentionally does so, he is fully responsible (in the morally liable-responsible use of the word). He should have known the potential consequences of his action based on his knowledge of artillery warfare even if he did not in fact know it.

With regards to ignorance of fact then, one's ignorance of the surrounding facts may serve to excuse one totally from any moral liability-responsibility. However, this claim must be genuine and, further, one could be ignorant of the facts yet be held morally liable because he should have known in the same way a person who is negligent can be held morally liable-responsible.

One factor that was previously mentioned along with ignorance of fact was how "accidentally" affected moral liability-responsibility. To refer to a wartime situation, A aims at B (where A and B are both combatants) with his rifle and A fires. Due to A's rifle not being properly sighted, however, the bullet passes over B's head, penetrates the thin side of building against which B was leaning, and kills a noncombatant hiding inside the room. The point to notice here is that such a description does not fall under the heading of intentional action. Just as in the golfer example (the golfer did not intend to slice the ball so that it smashed the window), the soldier did not intend to kill the noncombatant. Assuming there was no negligence involved (A could not have seen that he would be endangering the noncombatant), even though A is causally responsible for the noncombatant's death, he cannot be held morally liable. In this way, since A did not intentionally commit a moral violation, he cannot justifiably be held (morally) liable-responsible. The discussion of accidents, if not connected with negligence, does not fall within the area of individual responsibility.

Having examined the relation between ignorance of fact and superior orders, there is still the case where one knows the facts (or at least has a good idea of them) and is ordered to do something. The paradigm of this type of case is where one is told to do something that is clearly a moral violation. Such an order would be one to shoot the prisoners. In this case, the order violates the combatant-noncombatant dis-

inction and the individual ordered to violate it knows what he's being told to do. Can the individual be held fully morally responsible-liable in this situation? While one may want to reply in the affirmative, there are several considerations that may alter this immediate response.

The factor that may affect responsibility, and one previously mentioned, is coercion. One may be coerced into committing a moral violation because of the consequences one will (probably) undergo if one does not comply with the order. Consider the case sketched by J. Glenn Gray:

...the Dutch tell of a German soldier who was a member of an execution squad ordered to shoot innocent hostages. Suddenly he stepped out of rank and refused to participate in the execution. On the spot he was charged with treason by the officer in charge and was placed with the hostages, where he was promptly executed by his comrades.<sup>19</sup>

While this heroic soldier may not have been coerced, what about those others with doubts about the moral rightness of what they had been ordered to do? The threat was there, even if it was not explicit: Obey the order or be shot for treason.

This fits the mold of coercion previously discussed. There is a credible threat made which outlines some unpleasant thing that will happen to the agent if he does not do what he is told to do. Further, what he is being told to do is something he would not normally do and it is the act of threatening which serves to "negatively motivate" the agent. In this case, the threat of summary execution was used to coerce any reluctant members of the firing squad into obeying orders to kill inno-

cent hostages.

As Wasserstrom notes, however, questions of reduced responsibility for one's actions in such coercion cases hinge on what "...the likely consequences of disobedience..." are. This can be illustrated by varying the magnitude of the threat. While the case previously cited uses the extreme threat of death, consider the case where, if he refused to obey the order, the soldier would be demoted in rank or, more trivially, he would lose his pass privileges (he would be confined to the barracks for a period of time, perhaps a week).<sup>20</sup> This is exactly the same kind of case that was examined earlier.<sup>21</sup> As the magnitude of the threatened harm decreases, one should be held more and more liable for one's actions. Put differently, as the magnitude of the threatened harm increases, one's r-factor (in the sense of moral liability-responsibility) decreases. While one is not too sympathetic to the plea that the combatant murdered the prisoner because he would have been demoted and, hence, receive less pay, this is not the case when one learns that his family would have been killed if he refused to obey and was declared a "traitor."

It is interesting to note that, as with the previous discussion of coercion, no matter how grave the threatened harm, one is not totally excused from moral liability-responsibility. Again, this is because one still does have an operative free will. Even if the "reasonable choice" as constructed by the set of events and circumstances is such that the person's will

is influenced and he does commit a moral violation, he literally could have done otherwise. While some hold that persons are not to be blamed for not behaving heroically, they are to be blamed for not doing what is (morally) right.<sup>22</sup> It must be further acknowledged, though, that given the extreme cases of coercion sketched above, the degree to which one would be morally liable-responsible would be very small. To put this in terms of r-factor, one's r-factor may very well be close to zero.

Having said that if the threat is not very harmful, such as only a demotion in rank or loss of some privilege, this does not justify doing a serious harm, there is another scenario which may work the opposite way. Given that a trivial, not very severe, or incredible threat does not reduce moral liability-responsibility in a coercion case, if the threat is very large and what one is threatened to do not very severe, one may be excused or liability reduced. Consider this case: X is told to punch a prisoner or else he will be shot. Given that what he is required to do is not that serious and what is threatened is vastly more serious, X would be responsible for punching the prisoner yet may be totally excused. One factor to note here is the permanence of the threat. If X punches the prisoner even to the extent that he splits the prisoner's lip this injury will heal. This is not the case if X is shot for disobedience, however.

There may be another case of "coercion" that excuses total-

ly ( $r = 0$ ) but, as has been discussed earlier, this is not a real case of coercion at all. This is the case where the threat so terrifies the individual threatened that the agent ceases to be an agent at all.<sup>24</sup> If the soldier is terrified to the extent that he literally cannot do anything else but comply with the superior orders, the "coercion" in this case excuses. If coercion is defined as a case where one's will is influenced, however, this extreme terror situation cannot be classed as coercion for the simple fact the "agent" had no will operative. (Rather, he was compelled.) Referring back to capacity-responsibility, the presence of which was required for ascriptions of liability-responsibility, the terrified "agent" in this case does not have control of his conduct. In such a case, his  $r$ -factor would equal zero. It may not be such a clear cut issue though, because it was acknowledged that capacity-responsibility could also be in degrees. This leaves open the possibility that, although reduced or diminished, capacity-responsibility would be present and the agent subject to some reduced moral liability-responsibility (although not moral liability-responsibility of the full-blown type).

### Stress and Responsibility

The final factor that will be discussed as possibly affecting the individual responsibility of the soldier is that of his environment. Walzer refers to this plea as the "heat of battle"

defense.<sup>24</sup> Grey characterizes this another way which better captures the idea that this stress is not momentary:

Personal resolution is constantly attacked by the strain and disorder of combat life. [The soldier's] body, he discovers, is not always subject to his will. Impulses and emotions sweep him away, causing him to act...contrary to his sense of right.<sup>25</sup>

It is an uncontested fact that modern warfare makes the combatant's continued existence on the battlefield a possibility with a very low probability. The array of modern weapons incorporating the latest technology is staggering. The stress of knowing that he is in constant danger must take its toll. Coupled this with situations of sleep deprivation and physical exhaustion and one has a scenario where men could be severely affected. Put in terms previously used, the individual agent's capacity-responsibility is affected. While one's ability to reason properly and control his conduct may not evaporate entirely, it can very likely become diminished by the soldier's stressful environment. Just as persons considered under the M'Naghten rules were not held legally liable-responsible because they were unable to perceive the quality and nature of their actions, soldiers may also become so affected.

It must be recognized that what is being expressed is not the notion that after five minutes of battle all soldiers can disregard any moral distinctions and claim they lost their capacity-responsibility, however. It is only proposed that, given a combatant's situation in war, extended exposure to this type of intense stress may affect his capacity responsibility.

Again, as previously mentioned, this capacity-responsibility need not be one or zero; it may fall somewhere in between the two. Further, if the agent's capacity-responsibility is diminished (or nonexistent), so his moral liability-responsibility will be diminished (or nonexistent).

## Notes

<sup>1</sup> For a discussion of collective responsibility, see Individual and Collective Responsibility: Massacre at My Lai, ed. Peter A. French (Cambridge, Massachusetts: Schenkman Publishing Company, 1972).

<sup>2</sup> Peter A. French, "The Responsibility of Monsters and Their Makers," in Individual and Collective Responsibility: Massacre at My Lai, ed. Peter A. French (Cambridge, Massachusetts: Schenkman Publishing Company, 1972), p. 2.

<sup>3</sup> French, pp. 3-15.

<sup>4</sup> Michael Walzer, Just and Unjust Wars (New York: Basic Books, Inc., 1977), p. 311 and p. 306, respectively. All references to Walzer are to this work unless otherwise noted.

<sup>5</sup> While (moral) praise is a recognized part of moral liability-responsibility, the following discussion will focus primarily on blame or "negative" moral liability responsibility.

<sup>6</sup> Walzer, p. 42.

<sup>7</sup> George I. Mavrodes, "Conventions and the Morality of War," Philosophy and Public Affairs, Vol. 4, No. 2 (Winter '75), p. 126. Mavrodes does argue that the rules of war are convention-dependent.

<sup>8</sup> Walzer, p. 21.

<sup>9</sup> Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, Inc., 1974), p. 100. Underlined words in the quote were italicized in the original text.

<sup>10</sup> John Locke, Two Treatises of Government, ed. Thomas I. Cook (New York: Hafner Press, 1947), p. 131.

<sup>11</sup> Nozick, p. 100.

<sup>12</sup> Walzer, p. 304.

13 Richard A. Wasserstrom, "The Responsibility of the Individual for War Crimes," in Philosophy, Morality, and International Affairs, eds. Virginia Held, Sidney Morgenbesser, Thomas Nagel (New York: Oxford University Press, 1974), p. 55.

14 Teleford Taylor, Nuremburg and Vietnam: An American Tragedy (New York: Quadrangle, 1970), p. 36. Also cited by Walzer, p. 305, and Wasserstrom, p. 50.

15 Marshall Cohen, "Morality and the Laws of War," in Philosophy, Morality, and International Affairs, eds. Virginia Held, Sidney Morgenbesser, and Thomas Nagel (New York: Oxford University Press, 1974), p. 77.

16 Arthur Everett, Kathryn Johnson, and Harvey Rosenthal, Calley (New York: Dell Publishing Company, 1971), pp. 206-07. This text also quoted by Kurt Baier, "Guilt and Responsibility", in Individual and Collective Responsibility: Massacre at My Lai, ed. Peter A. French (Cambridge, Massachusetts: Schenkman Publishing Company, 1972), p. 42.

17 A. John Simmons, Moral Principles and Political Obligations (Princeton: Princeton University Press, 1979), pp. 16-23. I discuss this on pp.

18 Michael Walzer, "Two Kinds of Military Responsibility," in The Proceedings of the War and Morality Symposium, eds. Roger A. Rains and Michael J. McRee (West Point, New York: The United States Military Academy, 1980), p. 20.

19 J. Glenn Gray, The Warriors (New York: Harper Colophon Books, 1959), pp. 185-6. Gray's report also cited by Walzer, p. 314.

20 Wasserstrom, pp. 57-58.

21 This was done using Frankfurt's example of one threatened with various consequences if he did not set fire to a crowded hospital.

22 Wasserstrom, p. 58.

23 See Chapter I, pp. 33-34.

24 Walzer, pp. 304-5.

25 Grey, pp. 186-7.

### Conclusion

In this attempt to examine individual responsibility in war, several things have been done. The first was to briefly look at the notion responsibility in general. In the course of doing so, moral liability-responsibility emerged as the issue with which to be concerned in questions of individual moral responsibility. It was also found that another senses of responsibility, especially capacity responsibility, were found to bear directly on how morally liable an agent could be held. Also considered were various other factors that were taken to affect personal moral responsibility.

Having identified moral liability-responsibility and the factors that can affect it by following those things usually considered in legal liability (insanity, negligence, mistake, ignorance, accident and coercion), the rules of war were then scrutinized. This was because they are taken to be the standard of conduct for soldiers to follow in war. Having identified the function of the rules of war as twofold, to prohibit the intentional killing of combatants and to minimize the suffering of combatants, the distinction between the historic and ideal war convention was pointed out. Realizing that the former did not mirror the latter, the ideal rules were concentrated on. Further, it was argued that these two functions revolve around genuine moral distinctions and are not "convention dependent."

Finally, individual responsibility and the rules of war were discussed within the framework of war and from the viewpoint of combatant. Having his standard of conduct provided by the ideal rules of war, the combatant should act in accordance with this standard to avoid negative moral liability-responsibility. If he did not follow the rules of war, he committed a moral violation of either type: he either intentionally attacked a noncombatant or he used a forbidden means in combat between combatants. Given either one of these type of acts, he could not be assumed to be fully responsible for his actions, however, because a variety of factors could affect this responsibility.

In concluding, the point is that soldiers as combatants can be morally responsible for what they do in war. They are fully responsible unless at least one of the factors previously discussed is present. In this respect, their situation is parallel to the individual within more ordinary circumstances. Just as such an individual may be fully responsible (morally) for his actions, so, too, may a soldier bear full responsibility. However, just as the ordinary agent may be less than fully responsible or even excused, based on a multitude of factors, the combatant's responsibility may also be affected. Even though war is a difficult state to find oneself in, it is not the equivalent of a moral jungle where one has no guide for his actions or responsibility for what he does.

Given that soldiers can be responsible for their actions,

such traditional pleas of "military necessity" and "superior orders" must be carefully examined. One reason is that these are often used as "blanket excuses," devices invoked to avoid deserved moral liability-responsibility. As has been argued, the circumstances surrounding the combatant are crucial in regards to whether or not such pleas are justly used and, hence, mitigating or exculpating.

As a final note, in this far from complete examination of individual responsibility in war, many issues have been only touched upon or mentioned. The rules of war themselves need closer examination, as do the issues of the responsibility of military leaders and civilian leaders, as well as collective responsibility at both the level of the armed forces and nation. If nothing else, this effort may at least expose the tip of an iceberg worthy of closer examination. It would be far better to scrutinize these issues now than to find one's self embroiled in a war and then have to deal with them. Such a time of conflict may not provide the same atmosphere for reflective, careful consideration of such issues. These issues will arise in war, like it or not, and individual (moral) decisions will have to be made. The choice seems to be between making a decision having considered the moral distinctions involved or making a decision without prior examination.

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